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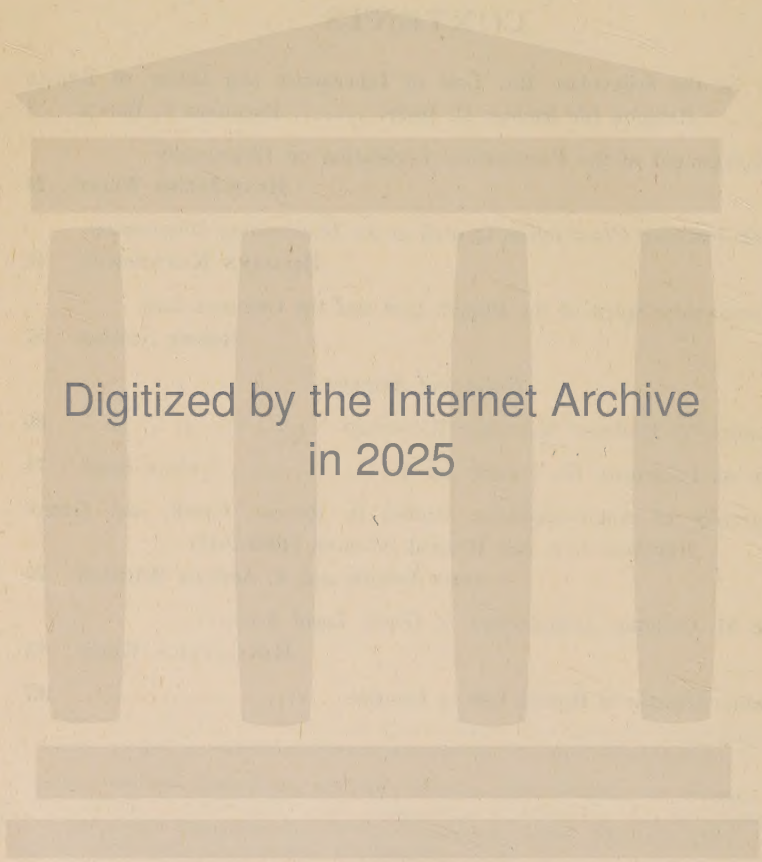

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CICERO VS. THE SCAEVOLAS

Re: Law of Inheritance and Decay of Roman Religion (de legibus, II, 19-21)*

LAW does not develop in a vacuum. It cannot be considered as a set of abstract rules or of cases only. Law is the expression of political and economic conditions, and of culture as a whole. One of the most important factors that shapes law is religion.

The following lines deal with the interconnection of Roman law of inheritance and religion. This is the topic of Cicero's famous polemics against two leading statesmen and lawyers, P. and Qu. Mucius Scaevola who had also been *pontifices maximi*. The arguments reveal the evolution of the will and the development of the fundamental conception of the heir in Roman law. The setting is a much disputed phenomenon: the decay of Roman religion, with its far-reaching effects on the fate of Rome. Dominant opinion considers Cicero's criticism of the two *pontifices* important evidence of the decay of Roman religion as early as the era of the republic. It will be shown how history of law and history of religion illuminate each other.

Ever since the days of the Renaissance the difficult chapters 19-21 of the second book of Cicero's *De legibus* have attracted scholars of various fields.[1] However, many doubts remain, not only as to the

* This article formed part of a collection of manuscripts presented to Professor Ernst Rabel on the occasion of his seventieth anniversary, January 28, 1944 (cf. Seminar, II [1944], 23).

[1] Treatises which deal *ex professo* with the chapters: F.C. v. Savigny, *Vermischte Schriften* I (1850), 151-204 (with references to the earlier literature); H. Burckhard, "Zu Cicero de legibus II, 19-21," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (= *ZRG*), *Rom. Abt.* IX (1888), 286-330; B. Kübler, "Zu Cicero de legibus II, XIX-XXI," *ibid.* XI (1890), 37-45.—Of

details, but also as to the meaning and tendency of the chapters as a whole. Recently the last scholar to work on this subject expressed the desire to have it investigated anew.[2]

I. THE TWO COLLECTIONS OF THE ORDER OF THE "SACRA".

The passage of the *Leges* is concerned with the *sacra privata,* the cult of the family, whose most important function was ancestor-worship.[3] Worship of ancestors was one of the bases of Roman religion. According to Cicero, the order of the *sacra* was founded "pontificum auctoritate, nulla lege" (*De leg.* II, 21, 52). The regulations issued by the pontiffs were usually called "edicts",[4] or "decrees"[5] of the *pontifices.* Sometimes reference is made to them as the "customary law of the pontiffs" of older and of recent order.[6] The pontiffs, however, had no *ius edicendi* as had the praetors.[7] Nor did they have the right to enforce their decrees as had the

books and articles dealing incidentally with Cicero's chapters the following may be cited: Karlowa, *Römische Rechtsgeschichte,* II, 901-904; L. Mitteis, *Römisches Privatrecht,* I, 96 n. 9; 98 n. 12; A. Pernice, "Sakralrecht II," *Sitzungsberichte der Preussischen Akademie der Wissenschaften,* LI (1886) 1198ff.; Georg Wissowa, *Religion und Kultus der Römer* (2nd ed., München, 1912), p. 72; E. F. Bruck, "Zur Entwicklungeschichte der Testamentsvollstreckung im Römischen Recht," *Grünhut's Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart,* XL (1914), 548, 563ff.; P. Bonfante, *Scritti giuridici varii,* I (1916), 237 and *Corso di diritto romano,* VI, 105.—B. Kübler, art. "Mucius" (No. 22) in Pauly-Wissowa, *Realencyclopädie der klassischen Altertumswissenschaft* (=*PW*), XVI (1935), 444; Emilio Costa, *Cicerone Giureconsulto* (Bologna, 1929), p. 242; Ernst Rabel, "Die Erbrechtstheorie Bonfantes," *ZRG, Rom. Abt.* L (1930), 315f.; V. Korošec, *Die Erbenhaftung nach römischem Recht* (Leipzig, 1927), pp. 99ff. (see: Ernst Rabel, *ZRG,* XLIX [1929], 580-585); Siro Solazzi, *Diritto ereditario romano* (Napoli, 1932), pp. 63, 122f.—Franz Leifer, "Altrömische Studien VI," *Festschrift für Koschaker,* II (1939), 244 n. 60.

[2] Leifer, *loc. cit.*

[3] See *infra,* III (1).

[4] Leist, *Der Römische Erbschaftsbesitz,* p. 174, Karlowa, *op. cit.* II, 901ff., F. Girard, *Manuel élémentaire de droit Romain* (5th ed.), p. 890.

[5] V. Korošec, *op. cit.* p. 101f.

[6] F. Kniep, *Gai institutionum commentarius secundus,* p. 190.

[7] Kniep, p. 190; differently Mommsen, *Römisches Staatsrecht,* III (1st ed. 1871), p. 152.

magistrates.[8] The capacity of the pontiffs to make law in the sphere of the *sacra* was based on their "opinions" (*decretum, responsum*) which they gave upon requests by magistrates or by private individuals (*consulere collegium pontificum, referre ad collegium pontificum*).[9] These opinions were filed in the archives of the *pontifices*. Their validity rested on the high repute (*auctoritas*) in which they were held.[10]

Cicero's report discloses that there were two collections of the order of the *sacra*, an earlier and a later one. Both of them are concerned with the question: who is liable for those expensive and troublesome sacrifices which had to be performed at the grave, at prescribed intervals according to a minute ceremonial? The older collection harks back to the *antiqui* (*pontifices*).[11] Cicero ascribes the later collection to P. Mucius Scaevola [12] who was consul in 133 B. C., and *pontifex maximus* from 130 to about 115.[13] Besides the *antiqui* and Scaevola, Cicero mentions the *pontifex* Tib. Coruncanius and *ceteri* as co-authors of an additional rule which reappears in the later collection of Scaevola.[14] Coruncanius was the first plebeian *pontifex maximus* (about 254 B. C.).[15]

Cicero's presentation (*De leg.* II, 19-21) is complicated. In order to afford a more comprehensive view, and to contrast the corresponding provisions of both collections, I present a chart:

[8] Wissowa, *op. cit.* p. 513; cp. A. D. Nock, *Journal of Biblical Literature* (1941) pp. 92ff.

[9] Cicero, *De domo*, 130-132, and frequently in Livy (particularly I, 20, 7). See Wissowa, *op. cit.* p. 514 n. 2, cp. 400 n. 8; 401 n. 1; 239.

[10] On the concept of *auctoritas*, which pervades the entire private and public law of the Romans (such as *auctoritas iurisprudentium, auctoritas senatus*, or *auctoritas* of the *princeps*), see R. Heinze, "Auctoritas", *Hermes*, LX (1925), 358ff.; Fritz Schulz, *Principles of Roman Law* (1936), p. 164.

[11] ". . . descripta ab antiquis his verbis" (*De leg.* II, 20, 49).

[12] *De leg.* II, 19, 49. In some other passages (see *infra*, n. 21) Cicero also refers to P. Mucius Scaevola's son, Qu. Mucius Scaevola (born about 140, *pontifex maximus* 89-82 B.C.; cp. F. Münzer and B. Kübler, art. "Mucius" [No. 22], *PW*, XVI [1935], 437-442, 442-446) as co-author of the later collection.

[13] F. Münzer, art. "Mucius" (No. 17), *ibid.* 425-428.

[14] *De leg.* II, 21, 52 i.f.

[15] Jörs, art. "Coruncanius", *PW*, IV, 1663.

I	II	III
Decreta of the "antiqui" (*de leg.* II, 20, 49): . . ita descripta ab entiquis. Nam illi quidem his verbis docebant:		*Decreta of P. Mucius Scaevola* (*de leg.* II, 19, 48): Quaeruntur enim qui adstringantur sacris.
Tribus modis sacris adstringi (1) aut hereditate		(1) Heredum causa iustissima est: nulla est enim persona, quae ad vicem eius, qui e vita migrarit, propius accedat.
(2) aut si maiorem partem pecuniae capiat [usucapio pro herede]		(3) Tertio loco, si nemo heres, is, qui de bonis, quae eius fuerint, cum moritur, usu ceperit plurimum possidendo [usucapio pro herede].
(3) aut si maior pars pecuniae legata est, si inde quippiam ceperit	(*de leg.* II, 21, 52) placuit *P. Scaevolae* et *Tib. Coruncanio,* pontificibus maximis, itemque ceteris, eos qui tantundem caperent, quantum omnes heredes, sacris alligari.	(2) Deinde, qui morte testamentove eius tantundem capiat, quantum omnes heredes... [mortis causa donatio and legacy].
		(4) Quarto, qui nemo sit, qui ullam rem ceperit, de creditoribus eius plurimum servet.
		(5) Extrema illa persona est, ut is, si qui ei, qui mortuus sit, pecuniam debuerit, neminique eam solverit, proinde habeatur, quasi eam pecuniam ceperit.

Cicero stresses one general principle which pervades all the detailed rules of the various collections and their strata: the *sacra are to be attached to the estate.* He thus summarizes this principle: "Now you see that all these rules depend on one principle, namely, the decision of the pontiffs that *the sacra are to go with the property.*" [16] And in another place: "Clearly our present laws on this

[16] "Videtis igitur omnia pendere ex uno illo, quod pontifices cum pecunia sacra coniungi volunt . . ." (*De leg.* II, 20, 50).

subject have been laid down by the authority of the pontiffs, in order that the performance of the *sacra* may be imposed *upon those to whom the property passes,* so that the memory of them may not die out at the death of the father of the family." [17]

As to the special rules of the two collections, only the most important ones will be mentioned at this point. According to both collections the *heir* (*heres*) is liable for the *sacra* in the first instance.[13] According to Cicero the liability of *legatees* was fixed by section (3) of the *antiqui,* to which corresponds section (2) in the later collection of Scaevola (see *supra* in the chart).

In the collection of the *antiqui* the legatee is liable for the *sacra* (" sacris adstringi "), " si maior pars pecuniae legata est, si inde quippiam ceperit." The phrase " si inde quippiam ceperit " (" if he has received anything of it ") apparently was intended to defeat attempts by the legatee of the greater part of the legacy to escape liability for the *sacra* by accepting only a minor part. In this case, too, he was to be held liable for the *sacra.* To all appearances this phrase was added later in accordance with the gradual development of the pontifical collection.

In the later collection of the Scaevolas the corresponding regulation is phrased as follows: He is liable for the *sacra* " qui morte testamentove eius tantundem capiat, quantum omnes heredes " (*De leg.* II, 19, 48). Thus, the following persons were held liable for the *sacra*: (1) The receiver of a *donatio mortis causa* (" qui morte . . . capiat "), that is, of a donation agreed upon during the life of the donor, to gain validity only after his death; and (2) the legatee (" testamentove "), provided that he receives as much as all heirs together (" tantundem capiat, quantum omnes heredes ").[19]

Here, the liability for the *sacra* differs from that of the earlier collection. In order to be liable under the terms of the earlier collection the legatee had to receive the "greater part " of the estate

[17] " Exposite haec iura pontificum auctoritate consecuta sunt, ut, ne morte patris familias sacrorum memoria occideret, iis essent ea [sc. sacra] adiuncta, ad quos eiusdem morte pecunia venerit " (*De leg.* II, 19, 48).

[18] *De leg.* II, 20, 49 and II, 19, 48.

[19] Stanislao Cugia, *Indagini sulla dottrina della causa del negozio giuridico: l'espressione " mortis causa " nel diritto romano classico e giustineaneo* (Napoli, 1910), pp. 33ff., 43ff.; see E. F. Bruck, *ZRG, Rom. Abt.* XXXIII, (1912), 569ff.; Jörs-Kunkel, *Römisches Recht* (2nd ed., Berlin, 1935), p. 361 n. 6.

of the deceased. The later collection imposes liability if he receives "as much as all heirs together." That might be even less than the *maior pars*. The liability of the donee of a *donatio mortis causa* and of the legatee was changed to "tantundem", says Cicero. This change had been introduced by the pontiff Tib. Coruncanius (252 B.C.) and by others (*ceteri*).[20] From the *antiqui* down to the Scaevolas the pontiffs wished to hold responsible for the *sacra* the donee of a *donatio mortis causa*, and the legatee.

II. CICERO'S ACCUSATION: IUS CIVILE VS. IUS SACRUM

Cicero does more than render a mere report. He sharply criticizes the two later pontiffs, P. Mucius Scaevola and Qu. Mucius Scaevola; this is the gist and direction of his argumentation. The violation of their duty as pontiffs with which he charges them concerns the protection of the *sacra*.[21]

In rhetorical fashion Cicero charges the Scaevolas with having violated the law of the *sacra* by means of the *ius civile*. Cicero, generally, was not fond of lawyers. "He who lacks ability to become an orator, becomes a lawyer" (*Pro Murena*, 29). Here he goes so far as to declare pernicious for a pontiff even the knowledge of both *ius sacrum* and *ius civile* (*De leg.* II, 19, 47, and II, 21, 52). Cicero accuses the Scaevolas of having invented devices whereby persons liable for the *sacra* could evade this liability, contrary to the principle of the pontiffs that the burden of the *sacra* must be borne by the property ("cum pecunia sacra coniungi"). In this connection he refers to the rule that the legatee who received "as much as all the heirs together" is liable for the *sacra* ("tantundem . . . quantum omnes heredes"),[22] and he mentions three cases where the Scaevolas had helped the legatee to free themselves from the burden of this rule:[23]

[20] *De leg.* II, 21, 52 (see the chart *supra*, col. II).

[21] Cicero mentions both Scaevolae: *De leg.* II, 19, 47 and II, 21, 52, furthermore *De leg.* II, 19, 50. In *De leg.* II, 21, 53, however, only "hic quidem Mucius" is mentioned; the father, Publius Scaevola, is mentioned shortly before.—After having quoted the later collection, Cicero simply speaks of "Scaevola" (*De leg.* II, 20, 49: "Haec nos a Scaevola didicimus"). In II, 21, 53, he refers to P. Scaevola (father) in connection with Tib. Coruncanius and "ceteri".

[22] *De leg.* II, 19, 48.

[23] Cf. Burckhard, *ZRG*, IX, 302; Kübler, *ibid.* XI, 38ff.

(1) In the case of a legacy of a quota of the estate (*partitio legata*). Such a legacy is concerned with the bequest of a quota of the estate rather than with the bequest of individual objects. If one half of the estate was bequeathed to the legatee—that is, " tantundem " as to the heir—then the legatee would be responsible for the *sacra*. But if the testator wanted to relieve the legatee of the burden of the *sacra,* and if he addressed himself to the pontiffs, they would advise him to deduct a nominal sum—usually 100 *nummi*—from the half, bequeathed to the legatee ("partitionis caput scriptum caute, ut centum nummi deducerentur," *De leg.* II, 20, 53). Then the legatee would receive less than the " tantundem " of the heir, and thus was free from the *sacra*.

(2) The second case deals again with a bequest of one-half of an estate. The testator, however, had neglected to include the deduction of 100 *nummi* in the will. Now the legatee asks the pontiff for an opinion what he should do to rid himself of the *sacra*. The pontiff advises the legatee to accept a trifle less than the " tantundem " bequeathed to him (" ut minus capiat quam omnibus heredibus relinquatur ", *De leg.* II, 20, 50). The result is the same as in the first case. The legatee was free from the *sacra*.

(3) The third evasion appears to be the most refined. Here, heir and legatee are co-operating. The legatee releases the heir from the obligation to pay the legacy (*nexi liberatio*). Thus he ceases to be a legatee, he is freed from the burden of the *sacra*. Simultaneously he obtains from the heir a formal promise of indebtedness (*stipulatio*) whereby the heir binds himself to pay him an amount equal to the former legacy. The payment would then no longer be received as a legacy, but in fulfilment of a *stipulatio*. Thus it was not subject to the obligation of performing the *sacra*. It was a profane payment which had nothing to do with the *sacra*. Indignantly Cicero exclaims: " This really has nothing to do with pontifical law; it hails directly from civil law " (" hoc vero nihil ad pontificum ius et e medio est iure civili ").[24]

Cicero's accusations, according to the dominant opinion among scholars, are taken as an important proof that Roman religion was decaying as early as the Republican era.[25] A great lawyer who was

[24] *De leg.* II, 21, 53.

[25] G. Wissowa, *op. cit.* n. 1 *supra,* p. 402 n. 2 (" [der] Verfall der sacra privata . . . ein besonders trauriges Zeichen für die Abnahme des religiösen Sinns". . . " Die Sacra werden von den zur Übernahme Verpflichteten durch

pontiff at that time, abused his office to release from their obligation persons bound to perform the *sacra* which formed the basis of Roman religion.

But the question arises whether we really meet here with the violation of pontifical law, as Cicero pleads. The decrees of the Scaevolas were issued, not as general rules, but as opinions concerning three concrete cases the facts of which we know only through Cicero's brief report. We do not know whether the facts were given completely, nor whether they were dressed for the occasion. We shall return later to Cicero's avowed habit of coloring his reports. Nothing is said in *De leg.* as to the exact contents of the wills, nothing as to the personalities of the participants, and nothing as to their relation to the testators. Yet, all these facts must have influenced the decision of the pontiffs.

Above all, we must remember that, in the cases referred to, the obligation to perform the *sacra* was not destroyed by the release of the legatee. Next to, and before the legatee there always stood the heir (*heres*). According to both the earlier and later collection of the pontifical law, the heir was primarily responsible for the performance of the *sacra.*[26] Also, the heir was, as a rule, a member of the family, and thus closer to the deceased and his family than the legatee. He was likely to perform the *sacra* far more conscientiously than the legatee. What interest had the heir in freeing the legatee from the burden of the *sacra* by undertaking the complicated procedure of formal promise, release, and payment (case 3 *supra*), except that he himself was ready to perform the *sacra,* for fear that the legatee would not take proper care of them? In his own drafts of these laws (*De leg.* II, 19, 47), Cicero advocates this sentence: "ut conserventur semper et deinceps familiis prodantur

die verschmitztesten Rechtskniffe abgeschüttelt und dem Untergange preisgegeben").—E. Costa, *op. cit.* n. 1 *supra,* p. 242 ("una profonda degenerazione"). See on the decay of Roman religion in the republican era, J. Marquardt, *Römische Staatsverwaltung,* III (878), 694; cp. Siro Solazzi, *Diritto ereditario romano,* I (1932), 63 n. 1.—Paul Collinet ("Les variations de l'usucapion 'pro herede' avant Hadrien," *Studi in onore di Salvatore Riccobono,* IV [1936], 143) seems to be of the same opinion.

[26] In the collection of the *antiqui*: "tribus modis sacra adstringi . . . *hereditate*" (*De leg.* II, 20, 49); in the later collection of the Scaevolae: "*Heredum* causa iustissima est, nulla est enim persona, quae ad vicem eius, qui e vita migrarit, propius accedat" (*De leg.* II, 19, 48. Cp. the chart *supra,* col. III, sec. 1). Both these passages are not in their original wording; particularly the quotation from the latter collection clearly shows Cicero's style.

et . . . perpetua sint sacra." It was precisely for the purpose of transferring the *sacra* to the family that the pontiffs released the legatee who had little interest in preserving the *sacra* of another family.[27]

Even in cases where the heir did not belong to the immediate family (*heres extraneus*), he still was close to the testator as a friend or otherwise. The testator himself had chosen him to be his representative; he was more than an executor of the will, he was the master of the estate of the testator. He had to apportion the estate, he was liable for the debts of the testator, he paid out the legacies, he freed the slaves as ordered by the will, he had to control the performance of conditions (*modi*) linked to the grant of a legacy.[28] He was far better suited to perform the *sacra* than the legatee who merely received some property. Cicero himself well describes the Roman concept of the commanding position of the heir when he says: "Heredum causa iustissima est; nulla est enim persona, quae ad vicem eius, qui e vita migrarit, propius accedat" (*De leg.* II, 19, 48). The objection that the *heres extraneus*, already burdened by family-*sacra* of his own, would be apt to neglect those of the testator,[29] holds for the legatee as well. The *heres extraneus* was still the lesser evil.

III. THE PONTIFFS, THE EVOLUTION OF THE WILL AND THE DEVELOPMENT OF THE CONCEPTION OF THE HEIR IN ROMAN LAW.

The principle of the earlier pontiffs, to burden the legatee with the *sacra* ("sacra cum pecunia coniungi") made good sense at a time when secular *mancipatio familiae* had displaced religious adoption by will (*testamentum calatis comitiis*). Let us briefly recall this development:

(1) The essence of the old *testamentum calatis comitiis* was an adoption performed by the testator primarily for his own and his ancestor's worship. A man without children was enabled to create himself artificially an heir in place of the lacking son. We find the same transaction used by various peoples, among them the Hindu, the Chinese, the Greeks, and the Germanic tribes.[30]

[27] Kübler, *ZRG*, XI, 44.

[28] Mitteis, *Römisches Privatrecht*, I, 106 n. 1A; p. 196ff.

[29] V. Korošec, *op. cit.* n. 1 *supra*, p. 100.

[30] Mommsen, *Römisches Staatsrecht*, III, 20; Mitteis, *op. cit.* I, 93ff; E. F. Bruck, *Die Schenkung auf den Todesfall im griechischen Recht* (Breslau,

Since time immemorial the son, and later also the adopted son, were responsible for the worship of the dead father and of the ancestors. The importance of this cult for the continued existence of the family, and consequently of the state, cannot be emphasized enough. The economic implications of death originally were far below the obligations to the dead man himself. The dead was cared for by his descendants. He was even supplied with food in his tomb at certain intervals. The fear of having to suffer hunger and thirst in the tomb determined the conduct of the living. Until a late period, even on Christian tombs there can be found receptacles (for instance shafts and tubes) for food and drink.[31] At a later stage, periodical offerings are made to the dead. Still later, the cult of the dead becomes spiritual. Comparative history of religion gives ample proof for the general existence of the primitive phenomenon. The desire to assure the cult of the dead by legal

1909), pp. 53, 104ff.; *id.* "Zur Entwicklungsgeschichte . . ." (cited n. 1, *supra*), p. 14ff.; Julius Jolly, *Die Adoption in Indien* (Würzburg, 1910), pp. 30-35; Jörs-Kunkel, *op. cit.* n. 19 *supra*, p. 317.—According to Chinese law and custom an "heir" was adopted for the express purpose of fulfilling the cult of the dead, if there was no son. Significantly, the heir was called "leader in worship". Examples of how such adoptions were performed in practice are recorded in a famous history book, translated by James Legge, *Tso-Chuen, Chinese Classics*, VIII (1939), 563ff. I am indebted to the eminent Chinese scholar, Dr. Hu Shi, and to Mr. Da-Chin Yih for these references.—Up to the present the cult of the dead has been preserved among the Chinese. The son and heir of a distinguished Chinese who passed away in Cambridge, Massachusetts, is remaining there for three years in order to perform the required worship at his father's tomb. He utilizes this time by studying at Harvard, This interesting example proves how deeply the conviction of the necessity of the *sacra* is rooted, even today. It was the same with the Romans.

[31] For special details see E. F. Bruck, *Totenteil und Seelgerät im Griechischen Recht* (München, 1926) p. 174ff., 318, also recently J. Quasten, "Vetus superstitio et nova religio: the Problem of the 'Refrigerium' in the Ancient Church of North Africa," *Harvard Theological Review*, XXXIII (1940), 256f.—All over the world we meet with this fear of having to suffer from hunger in the grave; in dry regions, this is coupled with a fear of thirst. To illustrate: the tombs in Babylon were placed near a fountain (Oscar Reuther, *Die Innenstadt von Babylon* [1926], p. 155f.). He who has no *pákidu*, that is, one who cares for him (cf. Thomson, "Assyrian Incantation Against Ghosts," *Proceedings of the Society of Bibl. Arch.* XXVIII (1906). 220, Coll. 1, 7), or he "whose ghost has no caretaker" (cf. the end of the *Gilgamesch* epic, verses 157, 158) has to eat "what remains in the pot, what has been strewn on the street." The man who had no *pákidu* created himself a caretaker by adoption, as did the Greeks, Romans and the Germanic peoples (Bruck, *ZRG, Rom. Abt.* L [1930], 669.)

provisions is at the root of the will, and of several other legal institutions.

The evolution of the will in Rome had the same origin. The cooperation of the pontiffs in adoption, the essence of the *testamentum calatis comitiis,* is a symptom of the prevalence of this concept. It was their task to see that ancestor-worship continued. That did not mean that they had to charge the heir expressly with the *sacra.* Ancestor-worship was an old, and deeply felt religious necessity.[32] The pontiffs, however, had to see to it that in making the *testamentum calatis comitiis* all was done to preserve the old custom.[33]

(2) But the *testamentum calatis comitiis* disappeared, and the *mancipatio familiae* took its place. The testator transferred his property (*familia*) to a trustee (*familiae emptor*), ordering him to transfer it in turn to certain recipients after the testator's death. This transaction, originally allowed only in cases of emergency,[34] gradually became the rule (Gaius, II, 103). It was far more convenient since it was restricted neither to two terms per year, nor to Rome and to those of its citizens who were allowed to participate in the *comitia curiata.*[35] In contrast with the public and religious character of the *testamentum calatis comitiis,* the *mancipatio familiae* was a private and purely secular transaction. The pontiffs had no share in it. The trust *inter vivos* served as its model (for instance: the *fiducia cum amico contracta*).[36]

[32] See Wissowa, *op. cit.* n. 1 *supra,* pp. 239ff.; Walter F. Otto, *Die Manen* (Berlin, 1923), pp. 53-63, A. D. Nock, *Journal of Biblical Literature,* LX (1941), 90ff.

[33] To explain the liability for the *sacra* one does not need to adopt Bonfante's artificial construction of a "sovereignty in the Roman household" (*sovranità domestica*). See Ernst Rabel's criticism, "Die Erbrechtstheorie Bonfante's," *ZRG, Rom. Abt.* L (1930), 315f.—The theory of a "transmission of personality" (*Vererbung der Persönlichkeit*: L. Mitteis, *Römisches Privatrecht,* I, 93ff.) approaches, it is true, historical reality more closely, but this elaborate construction is not fully adequate to the primitive way of thinking which existed in the beginning.

[34] ". . . si quis subita morte urguebatur" (Gaius, II, 102).

[35] Ed. Cuq, *Institutions juridiques des Romains,* I (2nd. ed., 1904), 259.

[36] Trusts, as is well known, are used in transactions *inter vivos* and *mortis causa* in various forms in the law of many nations. A survey is given by F. Klausing, art. "Fiduziarische Rechtsgeschäfte," *Rechtsvergleichendes Handwörterbuch für das Civil- und Handelsrecht,* III (1931), 368ff.—In the later Roman development the recipients of single objects became universal suc-

The recipients of individual objects of the estate through the *mancipatio familiae* acquired at first only these individual objects; they were "singular successors". They were responsible neither for the debts nor for the *sacra*. The *mancipatio familiae* offered no opportunity to nominate an heir (*heres*), that is to say a "universal successor" who would take over *ipso iure* the *sacra* and the debts. The earlier pontiffs, however, wanted to preserve the *sacra* under all circumstances: what else could they do but to charge with the *sacra*, by their decrees, the recipients of objects of the estate under the *mancipatio*?[37]

(3) Step by step the legal structure of the *mancipatio familiae* was changed (Gaius II, 103, 104). The emphasis in the *mancipatio* was shifted from the contractual performance of the transfer to the declaration of the testator (the *mancipans*), called *nuncupatio*, which was recorded (*in tabulis cerisque*). This document becomes now the most important part of the transaction. The trustee ceases to be an instrument of legal importance in the transfer. His position becomes purely formal, and is finally lowered to that of a mere witness whose presence, together with the other five witnesses is required only at the creation of the will. Thus a genuinely unilateral will came into existence, the later form of the *mancipatio familiae*, which has been called the "mancipation-will" (*Mancipations-Testament*). Thus, also, it had become possible again to appoint, not only legatees who were recipients of individual objects of the estate, but also—just as in the former *testamentum calatis comitiis*—an heir who was liable for the *sacra*. The heir, again, becomes the chief figure, the "master" of the estate of the deceased.[38]

cessors (heirs: see *infra*, sec. 3), whereas the Common Law has preserved the trustee (executor). In Common Law the recipients of objects from the estate given to them by the executor have not become universal successors (heirs), but, speaking in terms of Roman Law, have remained legatees: "To whom creditors looked for payment and to whom debts had to be paid, was the executor or administrator" (W. W. Buckland and A. D. McNair, *Roman Law and Common Law* [Cambridge, England, 1936], p. 114).

[37] ". . . cum pecunia sacra coniungi" (*De leg.* II, 20, 50); "ne morte patris familias sacrorum memoria occideret, iis essent ea [sacra] adiuncta, ad quos eiusdem morte pecunia venerit" (*De leg.* II, 19, 48).—Cp. Mommsen, *Römisches Staatsrecht*, III, 21f.; Bruck, *Grünhut's Zeitschrift*, XL, 558ff.; Rabel, *ZRG, Rom. Abt.* L (1930), 315.

[38] Mitteis, *op. cit.*, I, 93; Rabel, *Grundzüge des Römischen Privatrechts* (Holtzendorff's Encyklopädie, 7th ed. 1915, vol. I), p. 518.

The details of the process which changed the "individual successor" of the old *mancipatio familiae* into the *heres* and "universal successor" of the "mancipation-will" are disputed. This much is certain that the *heres* emerged only gradually, and that social and economic conditions played a considerable part in this change. The pontiffs transferred the burden of the *sacra* to him who succeeded to the freehold. As a rule, this man was likely to worship the ancestors of his own free will.

When the later form of *mancipatio familiae* (the "mancipation-will") came into use, the testator apparently named in the *nuncupatio* that person as *heres* who received the freehold and who continued the *sacra*. This is the legal figure which the Romans later came to call *heres ex re certa*.

The legal doctrines which we possess concerning the *heres ex re certa* originated all in a later period when the term *heres* had come to mean as a matter of course the person who succeeds both to assets and liabilities of the estate.[39] To classic Roman jurists the nomination of an heir (*heres*) for certain objects appeared to be entirely a contradiction in terms.[40] How could it be, classic jurists wondered, that a person can be nominated "heir" (that is to say, universal successor) and recipient of a certain object (*res certa*) at the same time?

But to nominate someone in case of death as heir and as recipient of certain objects of value at the same time is a disposition plainly comprehensible to common sense, as pointed out by Ernst Rabel.[41] When I was practising in German courts, I read and recorded numerous wills of peasants and artisans. Although the German Civil Code had taken over the Roman concept of "universal succession",[42] these testators preferred as a rule to nominate the heir in

[39] As to the origin of the Roman terminology for universal succession, cp. Longo, *Bulletino dell' Istituto di diritto romano* XIV, 127ff., 224ff.; XV, 283ff., furthermore Bonfante, *Scritti giuridici varii*, I, 250ff.; Rabel, *ZRG*, L, 298ff.

[40] The same view is taken by the jurists of the German common law, e.g. Windscheid, *Pandekten*, III, § 553 n. 2a.

[41] E. Rabel, "Elterliche Teilung," *Festschrift zur 49. Versammlung deutscher Philologen und Schulmänner* (Basel, 1907), p. 525, and *Grundzüge des Römischen Privatrechts*, p. 525 ("diese dem gemeinen Manne am nächsten liegende Verfügung").

[42] *Bürgerliches Gesetzbuch*, § 1922; cp. also the rule of interpretation in § 2087, sect. 2.

the form of an *heres ex re certa.* The jurists trained in Roman law used to tell these testators they should not nominate heirs to inherit certain objects. The testators followed such advice only with hesitation, and usually disregarded it entirely. To them it seemed much more plausible to link the nomination of an heir with the assignment of certain objects.

The *heres,* nominated to succeed to the freehold, continued the *sacra* as a matter of course. He appeared to be the connecting link between the original recipient of the freehold through the trustee (*familiae emptor*) and the new heir—the " universal successor ".

But this is the decisive point which must be recognized: *The " mancipation-will " again allowed a man—as had the former " testamentum calatis comitiis "—to nominate an heir explicitly.* This change in legal technique enabled the pontiffs *again to burden an heir with the sacra.* On the other hand, the pontiffs were no longer bound to apply strictly the rule that the *sacra* run with the legacies. If circumstances demanded it, *they could release the legatee.* In regulating the *sacra,* the pontiffs adapted themselves to the changed legal structure of the wills.

Both collections of pontifical law name the heir in the first place as the one responsible for the *sacra.*[43] This reference to the heir probably originated in the later collection and was only then interpolated in the collection of the *antiqui.*[44] For when the pontiffs gave the opinions which form the body of the earlier collection, the institute of *mancipatio familiae* did not yet know of an heir but only of a recipient of individual objects.

(4) The reappearance of the heir, who now was liable for the *sacra* under all circumstances, created a new situation. The cause which had motivated the *antiqui* to rule that the burden of the *sacra* should be borne by the property, had disappeared. It is evident that men as reasonable as the two Scaevolas no longer rigorously applied this old rule. If it was more equitable, and if the heir was personally able to perform the *sacra, they released the legatee from the burden of the sacra and left them to the heir.* This, in truth, amounted to a reform of the pontifical law of the *sacra.* This seems to me to be the real meaning of the " opinions " of the Scaevolas, which Cicero attacked.

[43] *De leg.* II, 20, 49 and II, 19, 48 (see the chart *supra,* cols. I and III, sec. 1).

[44] Korošec, *op. cit.* n. 1 *supra,* p. 103.

The method which the Scaevolas used in order to achieve this result seems complicated, to be sure. The layman, who is not acquainted with the technique of Roman law might point to case 3 (*supra,* II) as an example of odious legal sophistry. But this method corresponds to Roman legal thinking and to the so-called crypto-sociological technique of Roman jurisprudence. The Roman jurists preferred to use existing legal forms in an artistic way in order to create what really amounted to new law and corresponded to the social and economic conditions. We find this complicated technique exemplified in the well-known procedure whereby a son was released from the *patria potestas,* i. e., the *emancipatio.*[45]

A simple declaration of intention by the father in front of witnesses ought to have been, one may think, the most convenient method. The Roman lawyers thought differently. They seized on a rule of criminal law, contained in the XII Tables according to which the father was punished by losing his *patria potestas* if he sold his son three times. To satisfy this rule, a father who wanted to release his son from the *patria potestas,* sold him nominally three times. What a circuitous reasoning ("veteres circuitus")! The liberal use of fiction is another example for the same mentality.[46] Quite generally, it may be said that to pronounce new laws openly without the support of precedents or old laws was contrary to the conservative attitude of the Roman ruling class. This may serve as an explanation for more than one oddly formalistic procedure.

The thesis that the "opinions" of the Scaevolas were meant, in reality, to protect the *sacra* is strongly supported by the following consideration: the Scaevolas *freed the legatee from the burden of the "sacra" only if an heir was actually on the spot, and able to perform* the *sacra.* If there was no heir, they continued to enforce strictly the old rule that the *sacra* run with the property ("cum pecunia sacra coniungi"). This is in the first place illustrated by the case of the *usucapio pro herede.*

This well-known case dealt with a situation where an owner of property dies without leaving an heir. Anyone who occupied the estate and held on to it for the period of one year became rightful owner (*usu*). Legal recognition of this "istituto più misterioso"[47]

[45] Gaius, I, 132; *Epit.* 1, 6, 3f.

[46] This applies to Roman public law, also. Ch. H. McIlwain, *The Growth of Political Thought* (1932), p. 134.

[47] Bonfante, *Corso di diritto romano,* VI, 222ff.

is difficult to grasp for the mind of modern men. Already Gaius no longer understood this "improba usucapio" (II, 55).[48] Actually, the *usucapio pro herede* dates back to primitive times when force ruled. The conservative Romans preserved it, however, throughout the centuries. It was declared invalid only by Emperor Marcus Aurelius.[49]

However that may be, an heir was lacking in the case of *usucapio pro herede*. Therefore the *antiqui* had ruled that the *usucaptor* of the greater part of the estate was to be liable for the *sacra*.[50] The two Scaevolas took this rule literally into their collection: "Si nemo sit heres, is, qui de bonis, quae eius fuerint, cum moritur, usu ceperit plurimum possidendo," is liable for the *sacra*.[51]

But the Scaevolas went much farther than did even the earlier pontiffs. In case that neither heir nor legatee (and obviously no *usucaptor*) existed, the Scaevolas decreed two new rules which had not been contained in the *antiqui*, and they did so for the purpose of preserving the *sacra* under all circumstances, namely: (1) That *creditor* of the deceased should be liable for the *sacra* who had retrieved most of the estate.[52] (2) In the last place, they held the

[48] Gaius, whose reputation is not founded on his historical knowledge, uses the "aetiological" explanation that the *usucapio pro herede* had been invented by the pontiffs for the express purpose of preserving the *sacra* where there was an estate but no heir. On the origin of the *usucapio pro herede*, which cannot be considered more fully in this context, see the following authors whose opinions differ at various points: P. F. Girard, *Manuel élémentaire de droit romain* (5th ed. Paris, 1911), p. 878; Rabel, *Grundzüge des Römischen Privatrechts*, pp. 533, 535; Korošec, *op. cit.* p. 102, Siro Solazzi, *Diritto ereditario*, I (1932), 58ff.; Paul Collinet, *op. cit.* n. 25 *supra*, pp. 134-142.—Aetiological motivations are frequent. Cp. e.g. Polybius (VI, 56, 8) who gives a similar explanation for the origin of the *ius imaginum* which is a construction without any historic basis too.—The same applies to the explanation given by Servius' commentary to the Aeneid (VI, 218) about the origin of the *conclamatio*, that is the "calling of the dead" immediately after his death. This old religious custom was not introduced in order to awake the seemingly dead, as Servius believes (Hugo Blümmer, *Die Römischen Privataltertümer* [München, 1911], p. 483, n. 5).

[49] Gaius, II, 57: *Dig.* 47, 19.

[50] Cic., *De leg.* III, 20, 49: "si maiorem partem pecuniae capiat [sc. usu]." See the chart *supra*, col. I, sec. 2.

[51] *De leg.* II, 19, 48 (see chart, col. III, sec. 3).

[52] *De leg.* II, 19, 48: "Qui, si nemo sit, qui ullam rem ceperit, de creditoribus eius plurimum servet" (see chart, col. III, section 4). On this, cp. Kübler, *ZRG*, XI, 83; Korošec, *op. cit.*, p. 106.

debtors of the deceased liable for the *sacra*, since, due to the non-existence of an heir, they were released from their debts.[53]

Indeed, one cannot go further. If nobody else was available, the creditor who had received the greatest part of the estate, or the debtor who had no longer to pay, had to appear at the tomb of a perfect stranger, to whom they were linked only through financial interests, and to perform the periodic offerings.

To these rules Solazzi recently refers as *pressioni sacerdotali*, as a "becoming infuriated" (*l'arrovellarsi*) of the pontiffs. True religiosity, he claims, which was already disappearing at that time, had been still further harmed by the Scaevolas.[54] But one cannot talk, in any case, of a disappearance of religiosity with respect to heirs bound to perform the *sacra*, where such heirs were not existing at all. Had the *pontifices* not looked for a substitute in these cases, the *sacra* would have died out. Here we strike upon an intrinsic feature of Roman religion. The inner sense of religion, the spiritual bond with the gods and the dead is not the decisive point. In the first place there stands the correct performance of the formal acts prescribed by the cult.

IV. THE SCAEVOLAS AND CONSERVATIVE THOUGHT IN ROMAN LAW AND RELIGION.

Cicero's accusation that the Scaevolas had harmed the *sacra* by tricks is contradicted, in the last instance, by all we know about their personalities, about their activity as jurists and statesmen, about their relationship to state and religion. P. Mucius Scaevola and Qu. Mucius Scaevola were men imbued with traditional Roman views. They stemmed from a strictly conservative family. The younger Scaevola died for his political conviction (in 82 B. C.).[55] Both were among the foremost jurists of the Republican era.

Particularly of the younger Scaevola a rigid adherence to the law is characteristic.[56] Yet he did not lack understanding for true

[53] *De leg.* II, 19, 48: "Extrema illa persona est ut is, si qui ei, qui mortuus sit, pecuniam debuerit neminique eam solveret proinde habeatur, quasi eam pecuniam ceperit" (see chart, col. III, section 5).

[54] Solazzi, *op. cit.*, p. 63 n. 1.

[55] Kübler, *PW*, XVI, 444.

[56] Fritz Pringsheim, in *Conferenze per il XIV centenario delle Pandette* (Milano, 1931), pp. 196ff.; Johannes Stroux, *Summum ius, summa iniuria* (Leipzig-Berlin, 1926), pp. 29ff.; Ernst Levy, review of Stroux, *ZRG, Rom. Abt.*, XLVIII (1928), 677; Kübler, *loc. cit.*

equity. What he opposed was rather a form of jurisdiction based on vague equitable intuitions which would lead to a distintegration of the law. The rhetoricians, among them Cicero, were in the opposite camp.[57] Equity often was little more than a slogan to these men. What Cicero considers law he bases on philosophy as he understood it rather than on legal sources. In this regard, Cicero is again a true pupil of the Greeks who had no jurisprudence but philosophy of law only.

We do not intend to investigate here whether the Scaevolas always made the right decision. Perhaps they adhered too rigidly to the law and its words, and to the manifestation rather than to the intention of legal transactions.[58] But just this conservative adherence to the law and its letter is significant for the problems dealt with here. Both men were imbued with the importance of their sacerdotal position. Both believed thoroughly in the Roman religion as the religion of the state which they—like Varro or the Pontiff Maximus Cotta [59]—considered to be of vital necessity in the interest of the Roman state and which had, therefore, to be preserved.[60] Therefore they also opposed the Hellenizing of Roman gods, which they held to be incompatible with the dignity of these gods, and dangerous to the Roman state.[61] The Scaevolas were typical representatives of a pontifical theology directed toward the political shaping of the community.[62]

[57] Cicero (*Pro Caecina*, 65) speaks of *callidum versutumque ius* in contrast to the *aequum et bonum*. Cp. F. Pringsheim, "Bonum and aequum," *ZRG*, LII (1932), 82.

[58] As, for instance, in the case of the famous *causa Curiana*. Cp. Stroux, Pringsheim, and Kübler, *locc. citt.*

[59] Cotta declared: . . . "credo, ut opiniones, quas a maioribus accepimus de dis immortalibus, sacra, caeremonias religionesque defenderem. Ego vero eas defendam semper semperque defendi, nec me ex ea opinione, quam a maioribus accepi de cultu deorum immortalium, ullius umquam oratio aut docti aut indocti movebit . . . Mihi enim unum sat erat, ita nobis maiores nostros tradidisse" (Cicero, *De natura deorum*, III, 2, 1).

[60] Cp. also Mommsen, *Römische Geschichte*, II, 417f.

[61] Cp. Dionys. Hal. II, 18, 19 and, in addition, G. Wissowa, *op. cit.* n. 1 *supra*, p. 70.

[62] Cp. recently Alexander Beck, "Zur Frage der religiösen Bestimmtheit des römischen Rechtes," *Festschrift für Koschaker*, I (1939), 8f. The Scaevolas, however, are not mentioned here.

In looking back on Cicero's pleading against the Scaevolas, we remember his own words, which he had uttered on another occasion: "Concessum est rhetoribus ementiri in historiis, ut aliquid dicere possint argutius." But perhaps it was not Cicero's intention to color the facts. Inadequate comprehension of the legal technique of the Scaevolas may have been the cause.

The evaluation of Cicero has oscillated in the course of the centuries. But as highly as one may esteem the great mediator between Greek and Roman thought, he certainly was not a lawyer.[63] Besides, when he speaks as a theologian, Cicero is sometimes not beyond criticism. He misunderstood the nature of the gods.[64] Also Cicero was used to work rapidly. After the death of his daughter he composed in less than two years nine major philosophic treatises. "These works show, to a large extent, distinct symptoms of the nervous haste in which they had been produced. Nevertheless it is on them that rests, to a considerable part, Cicero's influence on posterity."[65]

Thus we reach this result: the Scaevolas, just as their predecessors in the pontificate, did all that was in their power to preserve the *sacra*, the old ancestor-worship. All they did was to adapt the religious precepts of the *ius sacrum* to the changing legal structure of an act of secular law, the *mancipatio familiae*. They reformed the rules determining the liability for the *sacra*. Cicero's remarks (*De leg.* II, 19-21) cannot be taken as evidence of the decay of Roman religion as early as the Republican era.

I should like to refer to another argument raised frequently in connection with Cicero's accusation against the Scaevolas as a proof of the "decay" of the *sacra privata* in the Republican era.[66] One refers to the well-known proverb "hereditas sine sacris", which was applied in order to indicate a windfall.

[63] L. Mitteis, *Römisches Privatrecht,* I, 47 n. 18; A. Steinwenter, *ZRG, Rom. Abt.,* L (1930), 594.

[64] Cp. Wissowa, *op. cit.* p. 72: "Cicero's books *de natura deorum* reveal a complete lack of understanding of the history and the peculiarity of the gods of his own nation." *Ibid.* p. 2: "Significant is the superficial manner in which Cicero (*de leg.* II, 19; *de natura deorum,* II, 61) enumerates Roman gods without any intrinsic or extrinsic order."

[65] Otto Plasberg, *Cicero in seinen Werken und Briefen* (Das Erbe der Alten, ed. by O. Immisch, 2nd series, XI, 1926), p. 9.

[66] Wissowa, *op. cit.,* p. 72; Geiger, art. "Sacra," *PW,* Suppl. I, 1660; Korošec, *op. cit.,* p. 99.

Actually, these words do not imply the elimination of the *sacra privata* at all.[67] It is easily understood that the cumbersome and expensive *sacra* were often felt as a burden. Today even devout people sometimes find it inconvenient to pay their church contributions. The proverb "hereditas sine sacris" does not prove at all that the *sacra* were not performed by the heirs. On the contrary, just because men as a rule became heirs *cum sacris* and because they performed them, too, a "hereditas sine sacris" was a reason for special delight. Only for a later time it can be proved that the heirs did not fulfill the *sacra*. From Gaius (in the middle of the second century A. D.) the inference can be drawn that the heirs no longer took care of the *sacra* as they were accustomed to do in former times.[68]

These later developments cannot be elaborated on in this article. It may be only added in brief that old Roman conceptions and the cult concerning life after death were preserved for a long time, down to the reception of Christianity. However, substantial changes took place which again were reflected by legal techniques of the profane law. Also in this respect religious thought and Roman law are interdependent and illuminate each other.

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[67] Wilhelm Kroll, *Die Kultur der Ciceronianischen Zeit,* II (1933), 17; Arthur D. Nock, *Journ. Biblical Lit.* LX (1941), 94.

[68] Gaius II, 55: ". . . ut essent qui sacra facerent, quorum illis temporibus summa observatio fuit" (this is to say, no longer in Gaius' time).—Festus, p. 290 (Bruns, *Fontes iuris Romani antiqui,* 7th ed., Tübingen 1909, II, 39): "[Sine sacris hereditas] in proverbio dici solet [cum aliquid obvenerit] sine ulla commodi appendice, quod olim sacra non solum publica curiosissime administrabant, relictusque heres sic pecuniae ‹ut› etiam sacrorum erat, ut ea diligentissime administrare esset necessarium."—The first part of the passage (*sine sacris—appendice*) only repeats the proverb of a "hereditas sine sacris" being a windfall. The clause "quod olim . . .", which is given to substantiate the first part, is in apparent contradiction with the sentence to be substantiated. If the *sacra* used to be observed "long ago" (*olim*), meaning they were no more performed in the time of Festus: why should the heir have been delighted? If he did not fulfill the *sacra* in either case, it was a matter of indifference to him whether he inherited *cum* or *sine sacris*. The passage apparently has been retouched. The sentence "quod olim . . ." hardly appeared in Varro's original text which has been epitomized various times. It was an addition of one of the later revisers, probably of Festus. Festus lived at the same time as Gaius. The sentence "quod olim . . ." coincides with Gaius II, 55.

THE BACKGROUND OF THE POST-CLASSICAL LEGISLATION ON ILLEGITIMACY

ON September 1, 539, Justinian finally regulated the status of illegitimate children in a comprehensive statute, *Nov.* 89. The contents of the law are in brief the following. It dwells on two main topics, chapters II-XI dealing with legitimation, and chapters XII and XIII providing for mutual rights of succession between fathers and their illegitimate offspring; chapter XIV regulates matters of guardianship, and the final chapter XV decrees that offspring of dishonorable, incestuous, or otherwise prohibited cohabitation should not be considered as *filii naturales* and thus be deprived of the privileges laid down in the statute for this category.

The chief ways of legitimation of bastards, as provided for by *Nov.* 89, were: presentation of the natural son to his father's *curia* in order to have him succeed into the father's position; giving in marriage of an illegitimate daughter to a *curialis* (so that the estate inherited by her would be preserved for the purpose of the *curia*); subsequent matrimony of the parents; and special indulgence of the emperor which, under certain conditions, might be obtained by the father and sometimes by the child himself. As regards succession, Justinian permitted a man who left legitimate posterity to will one twelfth or one twenty-fourth, respectively, to his bastards and their mother or to the latter alone. If he died without leaving either legitimate offspring or surviving ancestors, he might leave his whole estate to his illegitimate family; in case he was survived by ancestors his liberty of disposing of his estate in favor of his natural offspring was limited by the compulsory portion due his ancestors. The emperor, further, granted illegitimate children and their mother the right to inherit *ab intestato* one sixth of the father's estate, provided the latter died without leaving any legitimate offspring and had not co-

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habited with more than one concubine simultaneously. If there were legitimate descendants, bastards had no right to succession *ab intestato,* but were given a claim to support by those of their brothers and sisters who were the legitimate successors of their common father.

This elaborate statute was the climax of a legislative evolution of two centuries, which, beginning under Constantine and extending right into Justinian's *Novellae,* had brought about a fundamental change in the status of illegitimate children such as resulted from the Roman family law of preclassical and classical times. Most of the provisions of *Nov.* 89 merely reaffirmed what had already been laid down in imperial constitutions, incorporated in the *Codex,* and in several *Novellae.* In the beginning the spirit of this legislation had been one of rigid hostility toward concubinage. Later the general, but not entirely uniform, trend was toward a more compromising attitude. The details of this legislation are well known and need not be repeated here.[1]

Under the Roman law,[2] down to the end of the classical period, the illegitimate child had always remained outside of his father's family. The father might of course, under the Roman principle of complete freedom of the testator, remember the bastard in his will, might favor him with bequests or even make him his heir. But this was not different from any other case in which an *extraneus* was the beneficiary of a will. The gist of the post-classical legislation on illegitimacy, whether severe or lenient, was the recognition of the fact that the illegitimate child was, in relation to his father, something more than an *extraneus.*

[1] See the textbooks, most of which, however, give only brief statements. For more detail consult Paul Meyer, *Der römische Konkubinat* (Leipzig, 1895) 125ff.; George Cornil, *Droit romain* (Brussels, 1921) 567ff., 577ff.; Pietro Bonfante, *Corso di diritto romano* I (Rome, 1925) 233f., 238f., 273ff.; Fred H. Blume, "Legitimation under the Roman Law," *Tulane Law Review* V (1931) 256-266; Raymond Monier, *Manuel élémentaire de droit romain* I (Paris, 1935) 367f. See also Manlio Sargenti, *Il diritto privato nella legislazione di Costantino* (Milan, 1938) 132ff., and Eagbert Jan Jonkers, *Invloed van het Christendom op de Romeinsche wetgeving betreffende het concubinaat en de echtscheiding* (Amsterdam, 1938 [not seen]).

[2] Cf. Egon Weiss, art. "Spurius," in Pauly-Wissowa's *Realenzyklopädie der klassischen Altertumswissenschaft,* second series III, ii (Stuttgart, 1929) 1889f.; Paul-Frédéric Girard, *Manuel élémentaire de droit romain* (8th ed. Paris, 1929) 198ff.

It is obvious that the legislative measures of the emperors cannot be fully explained by their desire to secure the preservation of the *curiae*, quite apart from the fact that this tendency was responsible only for part of the measures and did not make itself felt in this field before the middle of the fifth century (*Nov. Theod.* 22.1). Nor is it of course possible to seek the chief cause for some of them in a purely personal interest of individual emperors in straightening out their own confused family affairs.[3] But the tendency stated remains likewise unexplained, if the reason for the vacillations of the legislation is found exclusively in the conflict between Christian morality, which abhorred extramarital sex relations, and Christian *misericordia*, which sought to alleviate the lot of children born of such intercourse.[4] The strong influence of both of these motives cannot be doubted,[5] and Bonfante[6] has aptly stressed the contrast between what he calls Constantine's "dominican" rigorism and Justinian's "franciscan" humanity. Nevertheless, the postclassical conception of the relationship of the bastard to his father, which had no support in the writings of the classical authorities, is something else. It could not have been formed had not those actual conditions which the imperial legislation was intended to regulate been such as to force the emperors to look upon the situation from a new angle, apart from their Christian point of view. The determination of these conditions is the subject of this paper.

[3] Paul Cuq, *Manuel des institutions juridiques des Romains* (2nd ed. Paris, 1928) 203 notes 2 and 3, and Blume, *op. cit.* 262, suggest that Constantine's decree concerning the *legitimatio per subsequens matrimonium* owed its existence to the emperor's wish to make legitimate his own bastard, Crispus, and presume a similar reason for Zeno's re-enactment of the measure in 477, *Cod. Iust.* 5.27.5.

[4] See Meyer, *op. cit.;* Bonfante, *Corso* I, 234, 239, *Scritti giuridici varii* IV (Rome, 1926) 567. Blume, *op. cit.*, 261f., is inclined to deny any ecclesiastical influence on Constantine's legislation; so does Jonkers, *op. cit.* (see Snyder, *Classical Weekly* XXXIII [1940] 162). This view obviously underrates the opposition to concubinage in the early Church; see Louis Charvet, "En marge de l'histoire du mariage," *Studia et Documenta Historiae et Iuris* III (1937) 336ff.

[5] The humanitarian motive is clearly expressed in *Nov. Theod.* 22.1.3 (A.D. 442): "una eademque saluberrima sanctione et horum (*viz.* filiorum naturalium) condicioni et curiarum commoditati subveniendum esse perspeximus," and in Justinian's *Cod. Iust.* 5.27.8 pr.: "humanitatis intuitu naturalibus patribus hoc indulgemus."

[6] *Scr. giur.* IV, 567.

II

A most remarkable feature of the postclassical legislation is the well known fact that, in designating the illegitimate child as a *filius* or *filia naturalis*, and the illegitimate father as a *pater naturalis*, it introduced a new terminology.[7] The idea of a *natural* relationship was not alien to the classical jurists. But in their writings the conception, as opposed to *legitimate* relationship, referred, apart from its occasional synonymity with *cognatio* (*Dig.* 38.10.4.2), to the physical relationship which remained between a father and his son whom he had given in adoption or dismissed from his paternal power by way of emancipation. In addition, *naturalis* was a technical term to express the relationship between a master and his slave-child and to denote the child born of parents who were slaves and cohabited in the quasi-marital state of *contubernium*.

Never was *naturalis* used by classical legal writers as a term indicating the relationship between a Roman citizen and his or her freeborn child born out of wedlock. Such employment of the term does occur in some inscriptions and in a diptych from Egypt, containing a *testatio* of 127 A. D. by M. Lucretius Clemens, a horseman of the First Thracian Cohort, "naturalem sibi filium in militia natum esse, Serenum, ex Octavia Tamusta."[8] In legal literature, however, and in imperial rescripts of the classical period the illegitimate son was always called a *vulgo quaesitus* or *spurius*. Where in the Digest or in Pre-Diocletian constitutions *naturalis* refers to illegitimacy, interpolation of the pertinent passage can be demonstrated. There is one possible exception, but it will be shown that this does not amount to a true deviation from the accepted terminology.

[7] Paul Gide, *Étude sur la condition privée de la femme* (Paris, 1885) 573; Meyer, *op. cit.* 126, 127, 133; Bonfante, *Corso* I, 233; Silvio Perozzi, *Istituzioni di diritto romano* (2nd ed. Rome, 1928) I, 377; Girard, *op. cit.*, 201; Vincenzo Arangio-Ruiz, *Istituzioni di diritto romano* (4th ed. Naples, 1937) 463; Sargenti, *op. cit.*, 136.

[8] H. Idris Bell, "A Latin Registration of Birth," *Journal of Roman Studies* XXVII (1937) 33. Bell, p. 33, indeed believes that *naturalis* is used as opposed to *adoptivus* rather than to *legitimus*. His opinion has been justly rejected by Fritz Schulz, "Roman Registers of Births and Birth Certificates," *Journ. Rom. Stud.* XXXIII (1943) 61 note 62.

1. *Dig.* 38.10.4.2 (Modest. XII *pandect.*):

> Cognationis substantia bifaria apud Romanos intellegitur: nam quaedam cognationes iure civili, quaedam iure naturali conectuntur [nonnumquam utroque iure concurrente et naturali et civili copulatur cognatio]. et quidem naturalis cognatio per se sine civili cognatione intellegitur quae per feminas descendit [quae volgo liberos peperit]. civilis autem per se [quae etiam legitima dicitur] sine [iure] naturali cognatio consistit per adoptionem. [utroque iure consistit cognatio, cum iustis nuptiis contractis copulatur.] sed naturalis quidem cognatio hoc ipso nomine appellatur: civilis autem cognatio licet ipsa quoque per se plenissime hoc nomine vocetur, proprie tamen adgnatio vocatur [videlicet quae per mares contingit].

Albertario has convincingly pointed out that the expression *cognatio copulatur* is of typically postclassical diction.[9] While I see no reason to condemn, with that author, the whole paragraph as *una evidente parafrasi postclassica,* the two clauses where this phrase occurs are glosses; they needlessly interrupt the context, inasmuch as they introduce an idea which is not directly connected with Modestinus' sole aim of defining the two types of *cognatio.* An obvious gloss is also the clause *quae volgo liberos peperit.* Mommsen's suggestion to substitute *de femina* for *per feminas* cures the text grammatically; but by confining the concept of *naturalis cognatio* to the case of illegitimate birth the jurist would have unduly narrowed its scope and given it a content which at least was not its chief implication in classical eyes.[10] The truth is, it seems to me, that Modestinus dealt only with the difference between physical and civil relationship. The question of legitimacy did not even occur to him. It was raised by a postclassical reader of the text, to whom the old distinction of *cognatio* and *adgnatio* did no longer mean much, while, in view of the imperial legislation and its terminology, illegitimacy appeared to him as the case where the concept of *naturalis cognatio* had its chief practical importance.[11]

[9] *Studi di diritto romano* I (Milan, 1933) 300 note 1.

[10] Perhaps it was not at all implied; see Ernst Rabel, "Grundzüge des römischen Privatrechts," in Holtzendorff-Kohler's *Enzyklopädie der Rechtswissenschaft,* 7th ed. I (Munich and Berlin, 1915) 413.

[11] As to the other corruptions indicated, see Siro Solazzi, *Studi in onore di Salvatore Riccobono* I (Palermo, 1935) 101f., and Gerhard Beseler, *ibid.,* 308.

2. *Dig.* 32.2.14.2 (Paul. XXXV *ed.*):

> Serviles quoque cognationes in hoc iure observandae sunt. igitur suam matrem manumissus non ducet uxorem: tantundem iuris est et in sorore et sororis filia. Idem e contrario dicendum est, ut pater filiam non possit ducere, si ex servitute manumissi sunt, etsi dubitetur patrem eum esse. unde nec vulgo quaesitam filiam pater naturalis potest uxorem ducere. quoniam in contrahendis matrimoniis naturale ius et pudor inspiciendus est: contra pudorem est autem filiam uxorem suam ducere.

The authenticity of this passage has been in dispute since Faber declared it interpolated from *unde* on; Coli has the interpolation start with *idem*. Others consider the whole paragraph genuine.[12] There can of course be no question but that everything that is said here is in agreement with classical principles (cf. *Dig.* 23.2.8; 23.2.54; 23.2.56; 23.2.68).[13] Nevertheless the wording and style of the passage arouse grave doubts as to its Pauline origin: *ius* with the connotation of "branch of the law;" anteposition of *igitur;*[14] and as for its style in general, the passage sounds as though written by someone accustomed to the style of imperial constitutions which lay down rather than expound the rules of the law. Furthermore, the second half of the paragraph is not logically connected with the first, because it is not true that the prohibition of marriage between parents and their illegitimate offspring follows (*unde*) from the fact that the same principle holds good for freedmen. Besides, the moral reasoning at the end of the paragraph is out of place, since its validity is not confined to the case of illegitimate relationship.

Thus we may safely attribute the whole paragraph—together with the following paragraph which has likewise been branded as totally interpolated[15]—to somebody who saw fit to recall in this place the fact that such consequences of blood relationship as outlined by Paul in pr. and § 1 with regard to the cases of adoption and emancipation also followed in other cases of mere physical relationship. The interpolator may be Tribonian; but

[12] Authors listed in *Index Interpolationum, ad loc.*

[13] See also Bonfante, *Scr. giur.* IV, 565.

[14] Cf. Beseler, *Beiträge zur Kritik der römischen Rechtsquellen* III (Tübingen, 1913) 105ff. The passage under discussion escaped Beseler.

[15] See *Index Interpolationum, ad loc.* Add: Arangio-Ruiz, *Istit.* 463 note 3.

more likely the additional remarks were the marginal gloss of a pre-Justinian editor of Paul's *Libri ad edictum.*[16]

3. The almost unintelligible text of *Cod. Iust.* 9.9.3 is obviously an unsuccessful abridgment of the original rescript (A. D. 213). Even if the words: *non naturalis* (viz. *patris mulieris*) *sed iusti dumtaxt* do have some foundation in the original text and are not a mere gloss, they cannot prove anything for the classical terminology.

4. *Dig.* 36.1.18(17).4 (Ulp. II *fideicomm.*):

> Si quis rogatus fuerit, ut, si sine liberis decesserit, restituat hereditatem, Papinianus scribit in libro octavo responsorum etiam naturalem filium efficere, ut deficiat condicio: [et in libertino eodem colliberto hoc scribit. mihi autem, quod ad naturales liberos attinet voluntatis quaestio videbitur esse, de qualibus liberis testator senserit: sed hoc ex dignitate et ex voluntate et ex condicione eius qui fidei commisit accipiendum erit.]

What Ulpian means by *filius naturalis* becomes clear from Papinian's decision which is preserved in *Dig.* 31.77.13. There the jurist discusses a testamentary provision made by a *patronus* in favor of those of his freedmen who are survived by their children and declares that this condition is to be considered fulfilled if the *libertus* leaves a son born in *contubernium* and manumitted simultaneously with his father. Hence Ulpian uses the expression *naturalis* in one of its classical connotations, and thus he was understood by the postclassical glossator: *et in libertino eodem colliberto hoc scribit.* This man, however, like the one who commented on *Dig.* 38.10.4.2, primarily associated, in typically postclassical fashion, the term *naturalis* with the idea of illegitimacy and therefore, in his further comment, approached the question posed by Ulpian from an entirely different angle.[17]

5. In the light of these sources, it may safely be assumed that classical authors were not thinking of illegitimate relationship in a few instances where the expression *naturalis* occurs without

[16] Stephanus, *index* of *Dig.* 23.2.14.2-4 (Heimbach III, 200) omits the case of illegitimacy. This may indicate several layers of postclassical additions to § 2. It seems that Stephanus used, not the *Digest*, but Paul's work in the form in which it was exploited by the compilers. *Unde rell.*, then, would appear to be a further interpolation, inserted by the latter.

[17] The interpolation has been known since Faber (see *Index Interpolationum, ad loc.*).

qualification, although it is quite possible that the compilers understood the term in the new connotation.

That no illegitimate descent was considered can be stated with reasonable certainty for *Dig.* 2.4.6 (Paul. I *Sent.*):

> Parentes naturales in ius vocare nemo potest: una est enim omnibus parentibus servanda reverentia.

The extent to which, in the classical conception, the praetorian limitation of the right of children to sue their parents (*Dig.* 2.4.4.1) applied to those born out of wedlock is clearly stated by Ulp. *Dig.* 2.4.4.3: "sed et si vulgo quaesitus sit filius, matrem in ius non vocabit." The illegitimate father enjoyed no protection under the rule. Paul's *parentes naturales* are freedmen, with respect to their *filii liberti,* and the physical parents of children emancipated or given in adoption (cf. Ulp. *Dig.* 2.4.4.3 and 2.4.8 pr.)[18]

Legitimus and *naturalis* are pointedly opposed to one another by Paul. *Dig.* 28.6.45 pr. (XII *resp.*). The decision that the mutual substitution of the *filius legitimus* and *filius naturalis* cannot be understood as made *in utrumque casum,* i. e., both *vulgaris* and *pupillaris,* but only as *vulgaris,* shows that the jurist contrasted the two terms, not as denoting legitimate and illegitimate in the modern sense but as meaning *suus* and *extraneus.*[19] To indicate the same contrast, the quality of the child as *naturalis* is emphasized by Scaev. *Dig.* 32.41.11 and Paul. *Dig.* 40.5.40 pr.[20] In all three of these cases the relationship can, and therefore should, be understood to be of such a character as commonly connected by classical writers with the term *naturalis,* that is to say, in one of the three senses just mentioned. The same is true of Hermog. *Dig.* 26.3.7 pr.

[18] This possibility was also considered by Jean Plassard, *Le concubinat romain* (Toulouse and Paris, 1921) 89.

[19] Beseler, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (=*ZRG*) *Rom. Abt.* XLVII (1927) 59, has Paul decide in the opposite sense. This is not at all convincing, although some linguistic flaws and peculiarities, noted by him, may indicate that the text is not entirely genuine; [*cum—poterit*] and the final sentence, [*et ideo rell.*], might be explanatory glosses. Incidentally, the interpretation of *naturalis* as given above would remain valid even if Beseler's radical suggestion were acceptable.

[20] Cf. Philipp Lotmar, *ZRG, Rom. Abt.* XXXIII (1912) 314.

6. There is indeed one passage where the possibility that a classical author employed *naturalis* with reference to illegitimacy cannot be excluded. It is the short fragment ascribed to the first book of Modestinus' *Pandects, Dig.* 1.6.11, where we read:

> Inviti filii naturales vel emancipati non rediguntur in patriam potestatem.

In the *Palingenesia* this and various other fragments appear under the heading, *De statu hominum,* and Lenel [21] has discovered that its original context was a comment on the *redactio in potestatem* of the children of an alien who had obtained the Roman citizenship. However, in its present isolation the fragment is difficult to interpret. Inasmuch as Modestinus obviously envisaged family relations of *peregrini,* the expression *emancipati,* if it occurred in the original text, must have been qualified in order to justify the analogy with the Roman institution, which the jurist apparently drew by using this technical term of the *ius civile.* This leads us to the conclusion that the categorical statement which has come down to us can only be the quintessence, presumably drawn by a postclassical paraphrast, of a more extended discussion by the classical author. It is, furthermore, almost certain that this discussion concerned an individual case.

The nature of this case cannot be guessed. In view of the fact, however, that a Modestinian question concerning peregrines most likely had arisen in the Greek sphere, it is difficult to assume that the jurist was confronted with a situation offering any true analogy to those which might result from the Roman *emancipatio.* The Greek family system was not apt to produce those economic situations which in Rome so often made it advisable for fathers to emancipate their sons without loosening the personal ties existing between them.[22] What appears to be the Greek counterpart of the *emancipatio,* the ἀποκήρυξις, was an extreme step resorted to only when it appeared necessary to cut the personal relationship between father and child, as well as to separate the latter legally from his father's family. In contrast at least with

[21] *Palingenesia Iuris Civilis* (Lipsiae, 1889) I, 721 note 4, where he refers to Gai. *Inst.* 1.93ff.

[22] See Bonfante, *Corso,* I, 59.

the praetorian law, it involved the son's disinheritance.[23] Roman emperors forbade it (*Cod. Iust.* 8.46.6). A father who had felt the need to take this step would hardly include the ἀποκηρυχθείς — and against the latter's own will at that—in his petition for citizenship and for an imperial rescript (Gai. *Inst.* 1.93) granting him the *patria potestas* over his children. But, as will presently be pointed out in greater detail, a class which at least in some areas of Greek law was probably to some extent socially, although not legally, comparable to the Roman *emancipati* were the νόθοι. I submit that Modestinus was confronted with a case involving a νόθος and, in the course of his discussion, called attention to this similarity. Somebody summarized what seemed to be the gist of Modestinus' decision into the present brief statement which indeed fitted well into the principles laid down in the imperial legislation on natural children. The authors of the summary were very likely the compilers themselves to whom the facts of the case, which involved the obsolete circumstance of admission of a peregrine to Roman citizenship, were no longer important.

If this hypothesis is correct, Modestinus may have used *naturalis* with reference to illegitimate offspring, although it is not impossible that it was the paraphrast who introduced the term. In any event, the Roman jurist did not seriously deviate from the usual. If he did term the νόθος a *filius naturalis*, he did so in view of the common classical habit of speaking of a *natural* relationship between a father and his *emancipatus*. He did not thereby imply that a Roman *spurius* might be called a *filius naturalis*. He did, however, as we shall see—and this is important from the point of view of this inquiry—anticipate the legislative terminology of the postclassical emperors for the same reason as it was chosen by the latter themselves.

III

1. As regards the postclassical terminology, it is of importance that the new use of the term *filius naturalis* is really due to an extension of the connotation which it had had in the classical legal literature. It is not merely the result of a translation from the

[23] See Egon Weiss, *Griechisches Privatrecht* I (Leipzig, 1923) 316 note 237, and sources and literature cited there; also Paul M. Meyer, *ZRG, Rom. Abt.* XLVI (1926) 319, and the treatise by Aldo Albertoni, cited by Meyer.

Greek which happened to coincide with the old expression of Latin legal terminology. The word commonly used for the illegitimate son in the Greek texts of the *Novellae* and in the *Basilica* is still *νόθος*. In the few instances where *φυσικός* occurs[24] it is obviously translated from the Latin. How strange the expression must have sounded to the Greeks even of Justinian's period is clearly indicated by the fact that in one of his Greek constitutions the emperor felt the need of explaining it; *Cod. Iust.* 1.3.44(45).3 (A. D. 530): *ὥστε μηδὲ φυσικοὺς ἢ νόθους νοεῖσθαι.*[25]

This means two things. On the one hand, the relation to their parents of those illegitimate children whom the jurists of the fourth, fifth, and sixth centuries had in mind must have had something in common with that of the persons classed as *filii naturales* by classical authors; for it cannot be assumed that the councillors of the imperial chancellery of the *Bas-Empire* suddenly connected with that expression an idea entirely alien to their predecessors who had adopted it as a technical term. On the other hand, the bastards envisaged by the postclassical legislation cannot have been exactly the same class as the *spurii* to whom the legal minds of the Principate referred when they discussed questions arising from illegitimate birth. Hence our investigation has to dwell on two topics. One involves the question of exactly what classical legal writers meant when they spoke of a *natural* relationship. The other concerns the question of who were those illegitimate children whose social or legal status was such as to cause postclassical legislators to consider it as analogous to that of the persons called *filii naturales* by their classical authorities.

2. It is certainly correct that *naturalis* in classical terminology has a factual rather than legal meaning, i. e., that it denotes the physical relationship as contrasted with the relationship, whether physical or not, which is based on, and recognized by, the *ius*

[24] *Nov.* 18.5; 74.4 pr.; 89.4; 89.10; 89.12.1, 2, 3; 89.13; 89.14; *Bas.* 9.7.36 pr. (Heimb. I, 473); 28.5.2.1 (Heimb. III, 199); 28.5.15 (Heimb. III, 204).

[25] In fact the term seems never to have become truly familiar in the Byzantine Empire. The authors of the *Tipucitus* and the *Basilica* were not sure that their readers would understand it; see *Bas.* 32.2.4.2 (summary of *Nov.* 89.12.3; Heimb. III, 526): *εἰς τοὺς νόθους· λέγει δὲ αὐτοὺς καὶ φυσικοὺς παῖδας*; Heimb. III, 527 (summary of *Nov.* 89.15; from the *Tip.*, see Heimb. VI, 425): *οὔτε νόθοι ἢ φυσικοὶ λέγονται.*

civile.[26] In this sense it is used in *Dig.* 38.10.4.2. The reason for distinguishing between natural and legitimate relationship can be twofold. The natural character of the relationship may be emphasized to contrast it with one that is based on the law and has no physical foundation; such is the case in numerous passages where the distinction between the physical child and the child by adoption is involved.[27] The other reason to call a child *natural* is the absence of any civil family relations between him and his father. This is the case which interests us here. Why did the legal writers of the classical period refrain from using the term *naturalis* in connection with illegitimate offspring?

The answer is that *naturalis* implies more than the mere physical relationship. Wherever in classical texts *naturalis* is employed to characterize the relationship between a child and his father who is not his *pater familias*, it always indicates, none the less, a true family relationship. This differs from the civil relationship in that it is not productive of the *patria potestas* and the right of succession inherent in the Roman civil family under the rules of the *ius civile*. Nevertheless it is socially and, to some extent, even legally recognized as resulting from marriage or a quasi-marital union and capable of bringing forth legal relations between the natural father and his child.

As regards legitimate children emancipated or given in adoption, these effects are well known and need only be recalled: *filii naturales* of this kind were admitted to praetorian succession in the class *unde liberi*;[28] obligations of mutual support between them and their natural parents were recognized;[29] they counted among those who procured for their father relief from the public duty of *tutela*;[30] the *pater naturalis* of the *filia adultera* had the same right of prosecution as the *pater adoptivus*;[31] the *emanci-*

[26] Meyer, *Konkub.* 36f.

[27] E.g.: Gai. *Inst.* 1.97; 2.136; Ulp. *Dig.* 1.9.5; 38.16.1.2; Paul. *Dig.* 38.6.4; 38.17.7; Marci. *Dig.* 1.7.31; Hermog. *Dig.* 37.14.21.3; Diocl. *Cod. Iust.* 8.47.2 pr.; 8.47.5. The same meaning of *naturalis* occurs in Gai. *Inst.* 3.41 and Paul. *Sent.* 4.8.4 (*Coll.* 16.3.3); both passages were misunderstood by Meyer, *Konkub.* 37. Cf. Bonfante, *Corso* I, 270, 273.

[28] Wolfgang Kunkel, *Römisches Privatrecht* (Berlin, 1935) 314.

[29] Bonfante, *Corso* I, 280.

[30] Bonfante, *Corso* I, 435.

[31] *Dig.* 48.2.23(22)pr.

patus and *datus in adoptionem* were restricted in their right to sue their natural father.[32]

In the *contubernium* the natural relationship between father and child was not, as it was in the cases just considered, the remainder of an original civil relationship; nor was the lack of the latter cured by the manumission of both father and child. Yet the jurists were prepared to accept the consequences of the fact that, as a social phenomenon, the *contubernium* was a marital union and recognized as such. They insisted on the execution of testamentary provisions conditioned on the fact that a *libertus* was survived by *liberi,* even if the latter were only *filii naturales;*[33] they allowed the *pater libertus* to vindicate into freedom his *filius libertus.*[34]

None of these effects, however, were admitted when the child was a *spurius.* At least to the middle of the second century the provisions of the *leges Aelia Sentia* and *Papia Poppaea,* which forbade the registration of *spurii* in the *album professionum* (*P. Mich.* III, 169) remained in force.[35] Despite the numerical importance of the *concubinatus,* and despite its acceptance by the moral conscience of pagan Roman society, its offspring was ignored by the law—save for the prohibition of incestuous relations—as far as the father was concerned.[36]

[32] *Dig.* 2.4.6.

[33] Pap. *Dig.* 31.77.13; 36.1.18(17).4; Scaev. *Dig.* 31.88.12.

[34] Ulp. *Dig.* 40.12.3 pr.

[35] According to Schulz, *Journ. Rom. Stud.* XXXII (1942) 82, this was changed by a *senatus consultum* or a *constitutio* issued under Marc Aurelius (see also Weiss, *ZRG, Rom. Abt.* XLIX [1929] 268ff.). The question whether the *testatio* made on the occasion of the birth of a *spurius* was a declaration before an official (Cuq, *Mélanges Paul Fournier* [Paris, 1929] 130ff.) or a private act (Schulz, *Journ. Rom. Stud.* XXXIII [1943] 60) does not matter here.

[36] Meyer, *Konkub.* 54ff.; Girard, *Man.* 199ff.; see also Plassard, *op. cit.* (above, note 18) 85ff., who, however, does not go far enough.—There is indeed the difficulty presented by *frg. Vat.* 194. However, in spite of Bonfante (*Corso* I, 435 note 7), I do not think that the passage must be understood to the effect that Papinian and Ulpian held the possession of sons born in concubinage sufficient to excuse the father from the burden of *tutela.* In my opinion, the solution of the problem should be sought in the direction of Meyer's interpretation (*Konkub.* 58), who suggested that Ulpian's distinction between *filii iusti* and *iniusti* referred to the contrast between *matrimonium iuris civilis* and *matrimonium iuris gentium.* The fragment becomes intelligible in the light

No doubt this attitude was somewhat rigorous in view of the fact that the effect of the restrictions imposed on Roman soldiers was purely legal rather than actual, and the evidence of numerous inscriptions shows that it was certainly not in full agreement with actual conditions of life in the Empire.[37] Its explanation must be found in the general social philosophy of the classical jurists who made the conceptions and standards of the upper classes of Roman society the basis of their legal decisions. In their overwhelming majority they sought to enforce the principle that non-marital intercourse with a *mulier ingenua et honesta* was *stuprum* and insisted on treating as marital every open and not entirely ephemeral cohabitation of people legally allowed to enter a marital union.[38] In theory, if not in practice,[39] con-

of the fact, shown by Percy E. Corbett, *The Roman Law of Marriage* (Oxford, 1930) 96ff., that the classical jurists knew no such thing as a *matrimonium iuris gentium,* but that some of them acknowledged, by coining the term *matrimonium iniustum* (Ulp. *Dig.* 38.11.1 pr.; see also *Dig.* 48.5.14.1) or *non legitimum* (Callist. *Dig.* 50.1.37.2), that there were cases of Roman citizens cohabiting with women lacking *conubium* in such a way as to elevate their union above the level of a mere concubinage and give it the character of a *de facto* marriage (Corbett 103f.; similarly Mitteis, *Römisches Privatrecht* [Leipzig, 1909] 71). There was no doubt that these liaisons were not marriages under Roman law, but these jurists, led by Papinian, felt that fairness forbade the treatment of the offspring as entirely *spurii,* i. e., as children born in a true concubinage, such as the jurists conceived it (see presently in the text above), just as they also allowed the "husband" in these unions to prosecute his mate for adultery (Pap. *Coll.* 4.5.1, Ulp. *Dig.* 48.5.14.1). See also Plassard, *op. cit.* 91, and Enzio Nardi, *La reciproca posizione successoria dei coniugi privi di conubium* (Milan, 1938) 25ff., with whose view, however, I do not fully agree.

[37] Cf. Meyer, *Konkub.* 90, Rabel, *Grundzüge* 422, Plassard, *op. cit.,* 108f., 160ff.

[38] See Mitteis, *ZRG, Rom. Abt.* XXIII (1902) 308; Guglielmo Castelli, *Scritti giuridici* (Milan, 1923) 144ff.; Emilio Albertario, *Studi di diritto romano* I, 200f.; Hans Julius Wolff, *Written and Unwritten Marriages in Hellenistic and Postclassical Roman Law* (Haverford, Pa., 1939) 94. Only toward the end of the classical period did some jurists, such as Papinian and Paul, assume a less rigorous attitude; in the early third century their view prevailed in the imperial chancellery (Gord. *Cod. Iust.* 5.4.6), while later in the same century the stricter principle seems to have been reasserted (see Flavius Vopiscus, *Vita Aureliani* 49); cf. Wolff, *op. cit.,* 94ff., also Mitteis, *op. cit.,* 310f. There is no doubt, however, that the uncompromising attitude of the classical authors was in conflict with actual conditions; see Mitteis, *op. cit.,* 309; Castelli, *op. cit.,* 152; Albertario, *op. cit.,* 203.

[39] In actual life persons whose union should have been considered a marriage according to the principles upheld by the legal authorities, frequently

cubinage remained reserved for unions with women so inferior to the man in social rank that there was no question even of considering it, like the *contubernium*, as quasi-marital and acknowledging the existence of any family relations between a man and the children of his concubine.[40] Only toward the end of the classical period did some of the jurists make certain concessions with respect to unions, particularly in the provinces, which could not be recognized as marital under the law but were held by the populace in equal esteem with fully valid marriages.[41]

This attitude was responsible for the denial to *spurii* of the title of *filius naturalis*. The term *filius* implied that the child in one way or another was part of the family of his father. He was a *filius familias* when he was born in a *matrimonium iustum* and the predestined successor of his father. He was a *filius naturalis*, but still a *filius*, when he had been begotten by the master with his slave, thus belonging to the former's *familia* in the old Roman sense,[42] but also—perhaps only in a more modern term-

were content with calling their relation a concubinage; the inscriptions gathered by Meyer, *Konkub.*, show many cases of concubinage between *ingenui* and *ingenuae* and between freedmen and freedwomen, both *colliberti* and *liberti* of different masters (Meyer, *op. cit.*, 70ff., 75ff.). Concubinage between freeborn citizens may of course have often been caused by the existence of impediments (Castelli, *op. cit.* 154, suggests this for the case in *Dig.* 34.9.16 pr.) or by the circumstance that the man was a soldier. It is, however, unlikely that this was always the case, and the frequent concubinages between libertines support this view. Perhaps the discrepancy between the legal theory and the views held by the populace can be explained on the hypothesis that, contrary to the doctrine of the jurists who primarily based their judgment on the actual character of the union itself (Albertario, *op. cit.*, 198, 204, 209f.; Wolff, *op. cit.* 93; cf. *Dig.* 39.5.31 pr.), people who had joined without going through the customary wedding ceremonies or drawing up *tabulae matrimoniales* were, in the popular view, not truly married.

[40] It is possible that in the original conception of the classical writers, such as based on the Augustan statutes, concubinage was only the cohabitation of *patronus* and *liberta*: Arangio-Ruiz, *Aegyptus* V (1924) 107; *Istit.* 462 note 1.

[41] See above, note 36.

[42] This, and not the fact that the *mater ancilla* was kept as a concubine (*Dig.* 20.1.8; 42.5.38 pr.; Paul. *Sent.* 5.6.16), was the reason why the son was called a *naturalis* (differently Meyer, *Konkub.* 38). The use of the term *filius naturalis* for a slave begotten by a free man not his master (Scaev. *Dig.* 36.1.80[78].2; Paul. *Dig.* 19.5.5 pr.) was apparently due to an extension of the original terminology.

inology—when he was born of people belonging to the Roman community, in a union which at least from the social point of view enjoyed the same esteem as the *iustum matrimonium* of Roman citizens. The *spurius* was, in the conception of the Roman family as developed in the archaic period and still upheld by the leading classes of the Empire, no *filius* at all.[43]

It is true that no distinction as strict as this was made in the everyday speech of the masses. We have already mentioned the diptych of 127 A. D. in which the soldier, M. Lucretius Clemens, calls the son born to him of his Roman concubine a *filius naturalis*. The expression also occurs in several inscriptions, with reference to children whose parents cohabited in the state of concubinage.[44] This, however, does not mean that those who wrote these texts connected with the term an idea fundamentally different from that of the Roman jurists. Their readiness to use the term in the indicated way—along with the still more frequent *spurius*, as well as *filiaster*, to be sure[45]—only reveals their willingness to admit the existence of quasi-marital ties where Roman jurists refused to do so. It was in the same spirit that they also used the terms *maritus, coniunx, uxor*.[46]

As a matter of fact, to a Roman soldier who maintained relations with a woman which to all practical intents and purposes were marital and would after his discharge be automatically transformed into true marriage, the distinction made by the law could but appear as niceties which had their effects in matters of *patria potestas*, succession,[47] and dowry,[48] but did not alter the social character of their relationship. Even more so must they appear to a man who cohabited with a freedwoman, or a Roman

[43] *Dig.* 38.17.2.1 refers to the *sc. Tertullianum* and has nothing to do with the above statement.

[44] Sources gathered by Meyer, *Konkub.* 39f. See also Plassard, *op. cit.*, 128ff.

[45] Meyer, *Konkub.* 43ff., 46ff.

[46] Meyer, *Konkub.* 68, 69, 75; Emilio Costa, *Bullettino dell'Istituto di Diritto Romano* XI (1898) 236; Plassard, *op. cit.*, 120ff., 142ff.

[47] The principle was somewhat relaxed by Hadrian who granted the children a praetorian succession *unde cognati; BGU* I 140 (Mitteis, *Chrestomathie der Papyruskunde* II, 373); see Mitteis, *Grundzüge der Papyruskunde* (Leipzig, 1912) II, 283, 286.

[48] Mitteis, *Grundzüge* 283ff.

citizen who lived with a peregrine woman *sine conubio* in an area where the recognition as marital of the peregrine ἀγράφως συνεῖναι had wiped out all differences between marriage and concubinage.[49] As Corbett has shown, toward the end of the second century even classical jurists paid their tribute to the actual state of facts, by calling unions of the latter type *matrimonia iniusta* and extending to them some of the effects of marriage.[49a] It was only natural that people occasionally referred to children born in such marriage-like liaisons by using the expression which even in the technical language of the jurists was common for the offspring of unions not essentially different in legal and social character.[50]

3. The classical conception of the *filius naturalis* as a child belonging to his father's family in the social, although not legal, sense was doubtless shared by the authors of the postclassical statutes. Both in the terminology of the jurists and everyday speech this idea was so closely connected with the expression that nothing else can be assumed. In view of the hostile attitude displayed by the Christian emperors toward any non-marital sex intercourse, it would have been strange if they, of all people, had bestowed on children born of such intercourse a title which had always implied membership in the family at least in the social sense, unless they did acknowledge that such membership existed in this case. This conclusion is confirmed by the fact that they themselves did not use the title indiscriminately for all illegitimate children. They reserved it for children born in a legally permitted concubinage, and Justinian called by the old name of *spurii* all those begotten in other kinds of illegitimate relationship.[51] What, then, caused them to give the classical terminology a broader application?

[49] Wolff, *op. cit.*, 72.

[49a] See above, note 36.

[50] See also Costa, *op. cit.*, 241.

[51] See *Cod. Theod.* 4.6.7; *Cod. Iust.* 1.3.44(45).3; *Nov.* 74.6; 89.1 pr.; 89.15 pr., Enantioph. *ad Bas.* 45.2.7 (Heimb. IV, 507); Steph. (see Heimb. VI, 222) *ad Bas.* 46.1.18 (Heimb. IV, 551). Cf. Meyer, *Konkub.* 126, 129; Bonfante, *Corso* I, 233; Perozzi, *Istit.* 313 note 2; Sargenti, *op. cit.*, (above, note 1) 136. The new connotation of *spurius* emerges very clearly from *Cod. Iust.* 6.57.5.1: "cum in mulieribus ingenuis et illustribus, quibus castitatis observatio praecipuum debitum est, et nominari (*viz.* heredes) spurios satis iniuriosum, satis acerbum et nostris temporibus indignum esse iudicamus . . .".

It is of course possible that they simply succumbed to the habits of speech which had long been common outside of the esoteric group of legal scholars. The untechnical manner in which specifically the decrees of Constantine were drafted[52] can certainly be cited in favor of this assumption. Moreover, documentary evidence that around the year 300 there was in the imperial chancellery a tendency to adopt the vulgar terminology does not seem to be wanting. In *Cod. Iust.* 6.55.6 of 294 we read:

> Ex libera conceptus et servo velut spurius habetur nec ut decurionis filius, quamvis pater eius naturalis manumissus et natalibus suis restitutus hunc fuit adeptus honorem [defendi potest].

This alone, however, can hardly explain the adoption of the new terminology which from Constantine on was quite technical. Our doubts grow stronger when we consider that one of the most conspicuous cases in which in classical times concubinage might be the basis of a true family in the social sense, namely, the concubinage of soldiers, did no longer have practical importance. When, nevertheless, postclassical officials—whose moral conscience was shocked by concubinage more than that of the classical writers—went beyond the latter's terminology, they must have been moved by social phenomena which had been ignored by their predecessors.

4. What conditions the emperors envisaged can be inferred, it seems to me, from the contents of their statutes and from the historical development of their legislation.

It is likely but not certain that Constantine's prohibition of gifts, whether *inter vivos* or *mortis causa,* to illegitimate children was directed to all classes of the population.[53] However this

[52] See H. S. Jones, art. "Constantine", *Encyclopedia Britannica* (14th ed., 1937) VI 299.

[53] Such is Meyer's opinion, *Konkub.* 130. Meyer infers this from the opening words of the fragmentary *constitutio, Cod. Theod.* 4.6.2, which form the introduction to the decision of an individual case. But *Cod. Theod.* 4.6.3, which was issued three months later and dealt only with liaisons of a special type, still includes in the gifts declared void in favor of legitimate children, relatives, or the fisc, those made to the offspring of forbidden unions in their capacity as *naturales.* On the other hand, subsequent legislation concerning the succession of *filii naturales* never distinguishes between classes. It is therefore likely—particularly in view of *Cod. Theod.* 4.6.4 and of *Nov. Marc.* 4.4—that Constantine did legislate to the effect supposed by Meyer, but this was probably done in a statute lost to us and possibly posterior to *Cod. Theod.* 4.6.2 and 3.

may be, those of his statutes of which we have knowledge referred primarily to the upper classes. This is obvious in *Cod. Theod.* 4.6.3 (*Cod. Iust.* 5.27.1) which extended the Augustan restrictions regarding eligible classes of women to the marriage of the leading groups among the provincials, and which even declared such women and their offspring incapable of receiving any benefits which their mate or father might bestow on them in their capacity as concubine or natural children respectively.[54] The same conclusion, however, is suggested also with regard to his decree which allowed the legitimation of bastards by subsequent matrimony of their parents. Meyer[55] has misunderstood the report on this enactment given by emperor Zeno on the occasion of his renewal of the law in 477, *Cod. Iust.* 5.27.5 pr. Constantine's law did not order, as Meyer seems to think, the automatic legitimation of all children who were prior to its issuance in such unions as conformed with the requirements laid down by the emperor (to wit, the requirement that there existed no legitimate wife nor legitimate children, and that the concubine was an *ingenua*). It only gave, as did Zeno's re-enactment, the father an opportunity of bestowing legitimacy on the children of his concubine by voluntarily transforming his concubinage into a marriage. This follows clearly from Zeno's words: *super ingenuis concubinis ducendis uxoribus.*[56] There is little doubt that such transformation, as again under Zeno's law, required the drawing up of *tabulae nuptiales.* This circumstance leads us to the inference that Constantine issued his decree, no matter what its theoretical range, primarily in consideration of certain habits practised by the upper classes. For we know that the emperors

[54] See Meyer, *Konkub.* 129.

[55] *Konkub.* 131.

[56] It does not matter whether Constantine's statute, like Zeno's (*Cod. Iust.* 5.27.5.1), was to affect only liaisons existing at the time of its issuance or was intended to be permanent. The former interpretation is commonly accepted, but has no foundation in the sources. It is just as possible that an act allowing legitimation was repealed by subsequent legislation, and this precisely may account for the fact that it seems to have been passed over by the compilers of the *Cod. Theod.* Krüger's proposal (*Cod. Iust. ed. stereot.* 217 note 5; see also Bonfante, *Corso* I, 233 note 5) to identify it with the lost *constitutio, Cod. Theod.* 4.6.1, seems to be ruled out by the fact that the decree allowed only the transformation into marriages of concubinages with *ingenuae,* so that it must have been issued later than *Cod. Theod.* 4.6.3.

found the formality of a written marriage contract necessary only when a great difference in social rank of the cohabitants was apt to cause doubts as to their intention of establishing a true marital relationship.[57] Since, however, prior to *Nov.* 74.4, this principle was implied in their laws rather than openly expressed, the inference that it had its origin in these decrees on legitimation by subsequent matrimony seems suggested.[58]

This observation provides us with the basis for a hypothesis. The statute preserved in *Cod. Theod.* 4.6.3 envisioned provincial conditions, and we shall hardly be mistaken in presuming the same, at least primarily, of the one reported by Zeno.

Among the upper classes of Rome and the Roman municipalities the penalties set against *stuprum* had prevented concubinage with freeborn citizens from obtaining great importance. Different conditions, however, must have prevailed in the autonomous Greek cities which even after the *constitutio Antoniniana* continued to live largely under their own customs and laws, unless these had been superseded by imperial decrees.[59] Here had existed, from times immemorial, the institution of παλλακία which differed from the Roman *concubinatus*, just as the legal and social status of the child of the παλλακή, the νόθος, was different from that of the *spurius*. The παλλακή[60] might be a slave or a free woman; in the latter case she was no doubt frequently a metic or native of another city, but just the same, after the *constitutio Antoniniana*, a Roman citizen and *ingenua*. Often παλλακαί were kept by married men. The legal status of νόθοι probably varied from city to city. It is likely that in the pre-democratic period of Athens the νόθος, if recognized by his father, and regardless of whether or not his father had a legitimate wife and legitimate children, was an inferior member of the family and, in the absence of legitimate offspring, entitled to succession.[61] It is true

[57] See Wolff, *op. cit.*, 91. Cf. Iustinus, *Cod. Iust.* 5.4.23.7.

[58] The *priscae leges* by which, *licet obscurius*, the *tabulae* had been required in such a case (*Cod. Iust.* 5.4.23.7) may well have been those with which we are dealing here.

[59] On this point see Mitteis, *Reichsrecht und Volksrecht* (Leipzig, 1891) 162f., and the convincing arguments advanced by Ernst Schönbauer, *ZRG, Rom. Abt.* LVII (1937) 344ff.

[60] See Wolff, *Traditio* II (1944) 73ff.

[61] Wolff, *op. cit.* 88ff., and the literature cited there, p. 89 note 216.

that in classical Athens,[62] and probably in other cities, too,[63] *νόθοι* were barred from *ἀγχιστεία* and *πολιτεία*, but there is evidence that elsewhere they still enjoyed the more favorable status.[64]

The assumption that in many places these conditions persisted right into the period of the Christian emperors will hardly appear too daring. It is true that explicit evidence for this statement is wanting. But indirect testimony is afforded by the probable interpolation at the end of *Dig.* 50.16.144,[65] and a further hint can perhaps be found in the fact that Constantine found it necessary to forbid expressly, in a decree probably issued in the East (Caesarea), concubinage *constante matrimonio* (*Cod. Iust.* 5.26).

Such were the conditions in which concubinage with freeborn women could be a living custom, particularly among the upper classes. They make understandable the desperate and, in the end, unsuccessful struggle of the Christian emperors against the *inaequale coniugium*, as Theodosius II and Valentinian III termed the relationship (*Nov. Theod.* 22.1.8; *Cod. Iust.* 5.27.3.2). They also explain why the lever that brought about the decisive change in the policy of the emperors was their fiscal interest in the preservation of the municipal *curiae*.[66] They finally account for the new terminology. In the Greek conception of the family, which made the *παλλακία* possible, the *νόθος* was a member of the family in exactly the sense implied by the Roman idea of *filius naturalis*—much more so than was, in the views of the Roman aristocracy, the son of a *concubina*. We had occasion to observe that possibly already a classical jurist, Modestinus, employed the term when dealing with a *νόθος*.

5. To be sure, these observations only suggest, but do not fully prove, the conclusion. It is, however, further supported by the post-Constantinian legislation on illegitimacy. As a matter of fact, the manner in which the emperors eventually met the custom

[62] Wolff, *op. cit.*, 76ff.

[63] For instance, Alexandria; see *P. Catt.* recto col. IV, lines 5ff.; Wolff, *op. cit.*, 79.

[64] Wolff, *op. cit.*, 89.

[65] Meyer, *Konkub.* 11, Wolff, *op. cit.*, 73. See also Hesychius *s.v. νοθογέννητα* (cf. Wolff, *loc. cit.*), *Nov.* 18.5, and Thalel. *schol. παλλακίδα ad Bas.* 45.1.42 (Heimb. IV, 497).

[66] *Nov. Theod.* 22.1 (*Cod. Iust.* 5.27.3); cf. Meyer, *Konkub.* 136f.

of concubinage can best be understood if seen against the background assumed.

The emperors were facing two problems. The first—opening to natural children a path toward legitimation—is immaterial from the point of view of the present investigation. Prior to Justinian who found a lasting solution,[67] it was tackled only occasionally, and the legislative steps taken represent more or less ephemeral (Constantine and Zeno, *Cod. Iust.* 5.27.5) and more or less radical, high-handed attempts to reduce to a minimum the number of illegitimate children; they culminated in Anastasius' law of 517 (*Cod. Iust.* 5.27.6) which almost abolished the difference between marriage and concubinage and was so repugnant to the moral conscience of the time that only two and a half years later it was revoked with strong words (*Cod. Iust.* 5.27.7 pr. and 3).[68] The second problem, however, which concerned the rights of succession to be granted to bastards, presented the legislators with the task of reconciling social reality with the ethical demands of Christianity, fiscal necessities, and the interest of the family of the illegitimate father, on the one hand, and of the natural child, on the other. The answers which they gave to these questions show, in my opinion, that they fought against, and finally yielded to, a custom which by the force of an immemorial tradition was ineradicably rooted in the social consciousness of the Greek population.

The rules laid down by the emperors for the succession of the *filii naturales* are not Roman. The exclusion of illegitimate children from the right to acquire their father's property by virtue of his will cannot be interpreted to the effect that a new cause for incapacity was added to those established by the Augustan legislation.[69] Being a bastard was not, like being a *caelebs,* a personal quality which as such affected the capacity of acquiring property by will. The share in the succession or the bequest were not *caduca,* and the effects of the statutes in question were different from those which were brought about by the earlier laws on *bona caduca.* It was the will of the father which was declared

[67] For the details see Meyer, *Konkub.* 144ff., 149ff., 151f.

[68] Meyer, *Konkub.* 139ff.

[69] Such is the view of Gide, *Condit. privée de la femme* 583, Meyer, *Konkub.* 126, 142, Girard, *Man.* 201.

ineffective, in so far as it favored the *filius naturalis,* and the property fell to the legitimate heirs. The legislative intention of the emperors was not to discriminate against the *filii naturales* in a general way but to curtail the father's freedom in disposing of his estate by will.

This deviation from one of the most characteristic of Roman legal principles is understandable only if the emperors were dealing with conditions dissimilar to those encountered by the classical jurists. Their decrees gave expression to their desire *to keep out of the family* such elements as, from their point of view, —but against that of certain classes of the population—were not suited for membership in the family. The strength of the custom against which they fought is evident from their own legislative policy; as early as 371 they began to relax the principle of absolute exclusion of the illegitimate child and his mother from any acquisition by virtue of the will of father or cohabitant (*Cod. Theod.* 4.6.4). The fact that the tendency of this custom was precisely to give the natural child some status in the family is apparent in those statutes in which the emperors, for fiscal or other reasons, yielded to it. The law of 442 (*Nov. Theod.* 22.1), by which Theodosius and Valentinian allowed fathers to bestow the rights of legitimate successors on their natural children by enrolling them in the *curia,* involved acceptance of the existing notion that these children were members in their father's family, save for barriers erected by positive legislation. And even more so did Justinian's eventual elevation of concubinage to the rank of a legitimate union of an inferior type and his grant to the natural child of a limited right to succession *ab intestato* (*Nov.* 18.5; 89.12.4).

All this leads us again back to those social conditions which we assumed for the Greek sphere, notwithstanding the fact that the laws in question were issued by eastern and western emperors conjointly and therefore valid for the whole Empire. Moreover, the rules of succession laid down by the emperor when they yielded to the persistent custom fit in with this result. It was already stated that there is reason to assume that in those Greek communities where *νόθοι* were not, as they were in democratic Athens, entirely barred from *πολιτεία* and *ἀγχιστεία,* they enjoyed a secondary right of succession, dependent on the non-existence of *γνήσιοι,* but in preference at least to collateral relatives of the defunct. This was in the main the principle adopted by the em-

perors, first for the *curiales* and later generally. It is true that, possibly in contrast with the Greek solution, they granted, in the case of *curiales*, to surviving ancestors of the defunct a right of succession in competition with his bastards (*Nov. Theod.* 22.1.6) and that Justinian kept within narrow limits the intestate succession to which he admitted the bastards in the absence of legitimate descendents. Those were modifications which find a sufficient explanation in the general objectives which determined the legislative policy of the emperors.[70] The fact remains that in making their concessions the emperors did adopt the basic principle of the ancient Greek law of the νόθοι.

6. There remains only one question. Are we really justified in asserting that it was specifically Greek custom and Greek law which caused the emperors to relax their hostility toward concubinage and influenced them in shaping the new status of illegitimate children? There can be little doubt that habits and conceptions similar to those of the Greeks existed among other nations of the Empire as well, both in the East and the West; as far as the West is concerned, the favorable legal status enjoyed by bastards in occidental countries during the early Middle Ages can be cited in support of this assumption.[71] But it is highly doubtful on general grounds that the ideas of peoples who were considered as barbarians could exert any influence on the imperial legislation.[72] Moreover, the very fact that it was Justinian who spent so much effort on bringing about a final solution to the problem points to the East, where Greek civilization was the dominant factor.

IV

If the result of this investigation is correct, it reveals a certain Greek influence on the late Roman family law. In order to avoid possible misunderstanding, however, I should like to make

[70] The same is true of other modifications, such as the prohibition of concubinage *constante matrimonio* and of multiple concubinages.

[71] As to Germanic law, see Heinrich Brunner, *ZRG, German. Abt.* XVII (1896) 1ff.=*Abhandlungen zur Rechtsgeschichte* (Weimar, 1931) II, 165ff.

[72] Germanic influence is ruled out by the fact that in early Germanic law the bastard had still (as possibly also in the most primitive stage of Greek law: see Walter Erdmann, *Die Ehe im alten Griechenland* [Munich, 1934] 364ff.) a right to intestate succession in competition with his legitimate brothers; see Brunner, *op. cit.*

the following point clear. The emperors were confronted with the phenomenon of παλλακία and its concomitant idea that the νόθος was a member of his father's οἶκος and secondary successor. They finally yielded to the ineradicable custom to some degree and adapted their statutes to it. But they upheld the basically Roman character of the family law. Even Justinian, who met the Greek idea to such an extent as to concede to *filii naturales* not prevented by legitimate descendants a limited right of succession *ab intestato*, and who gave the *filii naturales* a claim to support against their legitimate brothers (*Nov.* 89.12.6), took pains to exclude any relations of mutual succession between a *filius naturalis curiae oblatus* and the relatives of his father (*Cod. Iust.* 5.27.9 pr. and 1).[73] In other words: he confined his recognition of the bastard as a member of the family to the merely personal relationship between father and son and to the former's immediate "family" in the social sense, as consisting of the father and his children.[74] He still refused to assign to the *filius naturalis* a place in the cognatic family of his time, such as it had grown out of the principles of the praetorian law of succession. The Greek influence which this paper may have demonstrated was purely external, limited to the adaptation of the law to certain social conditions which had proved stronger than all the attempts to suppress them; it did not affect the fundamentally Roman character of Justinian's family law as a whole.[75]

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[73] Meyer, *Konkub.* 137 note 286, suggests—perhaps correctly—that Justinian reaffirmed rules laid down in earlier legislation.

[74] Justinian's decree of 531, *Cod. Iust.* 5.27.12, which permits a grandfather leaving no legitimate descendants to will his whole estate to the natural son of his legitimate son or to the legitimate or natural son of his natural son, is no obstacle to this view. The emperor to this extent simply restored the freedom of the testator, because the moral reasons which in other cases had called for its curtailment did not apply in this case (see § 3 of the constitution). In § 4 he emphasized the lack of an intestate succession, and the whole decree is reaffirmed in *Nov.* 89.4; 89.12.6.

[75] Recently the basically Roman character of the pre-Justinian postclassical law has again been justly emphasized by Adolf Berger, *Annuaire de l'Institut de Philologie et d'Histoire Orientales et Slaves* VII (1939-1944) 368. See on the problem in general: Mariano San Nicolò, "Il problema degli influssi greco-orientali nel diritto bizantino," *Atti del Congresso Internazionale di Diritto Romano—Roma* (Pavia, 1934) I, 255ff.

A GREEK JUSTINIAN CONSTITUTION QUOTED IN THE DISSENSIONES DOMINORUM

By the Late Dr. Hermann Kantorowicz *

IN the first book of *De appellationibus* Macer says, if we are to believe *Dig.* 2, 8 (*qui satisdare cogantur*) 15, pr.: "Sciendum est possessores immobilium rerum satisdare non compelli."

The glossators were protected by their scanty knowledge of legal history in general, and of interpolations in particular, from wondering why a classical jurist should speak of "satisdare" instead of "vadimonium promittere" or the like; nor could they know that in Caracalla's time the plaintiff, apart from certain cases of representation, gave no security,[1] so that Macer must have meant the defendant only. But the wording of the passage in Justinian law —the only one with which the glossators were concerned— allows us to refer the text to both plaintiff and defendant, and then so practical a matter as the rules on security in litigation would become inapplicable: under social and economic conditions such as prevailed in the time of the glossators (and had prevailed in Caracalla's time as well as in Justinian's) there must have been very few litigants not possessing any immovables however trifling, particularly if we understand "possessores" in the very wide acceptation of the term in which it is construed in the law "Sciendum". The glossators overcame one of these difficulties by restrictive interpretation. Among the questions raised by Accursius in commenting on this passage is this:[2]

* The Editors of Seminar wish to pay tribute by this posthumous publication to the memory of the late lamented scholar (d. February February 12, 1940) of whom Professor F. de Zulueta wrote in the *Law Quarterly Review*: "In the literary history of medieval canon and civil law he had no equals among the living, and very few among the dead." They also express their gratitude to Mrs. H. Kantorowicz who kindly offered the manuscript to this magazine, and to Professor W. W. Buckland for his assistance in preparing it for the press.

[1] Details in Buckland, *Textbook of Roman Law*, 2nd ed. (1932) 712f.

[2] *Dig.* 2,8,15,pr. v. *compelli*, according to the printed editions checked on the MS . . . [unfinished footnote. Ed.].

> Quarto: an pro vili cespite terre evitet satisdationem etiam in causa centum marcharum? Respondeo secundum B[ulgarum]: non evitat, arg. Infra de privilegiis creditorum, Si creditores [*Dig.* 42, 5, 31, pr. = 42, 6, 16, pr. *Vulg.*] Esset enim absurdum, si quis conveniatur in magna quantitate pecunie ut propter modicum cespitem terre quam possidet possit evitare satisdationem . . . Tu dic secundum Joan[nem Bassianum], quod est equum quod non cogatur satisdare possessor rei immobilis, si tamen res illa sit idonea et etiam sufficiens ad litis estimationem, etiamsi de alia re convenitur: cum enim succedat possessio loco satisdationis, debet pro qualitate rei petite esse possessio.

The decision is reasonable but neither supported by the analogy suggested by Bulgarus nor by his great pupil's dialectical argument. They would have found better grounds had they known Greek, as we shall see.

Other doubts were even aggravated by three Justinian Novels dealing with security. None of the Novels distinguished between possessors of movables and immovables, and one of them did not make it clear whether it spoke of the plaintiff or of the defendant. The Novel is *Nov.* 53 (= coll. V, tit. 6 *de exhibendis*) c. 3 § 2, with the corresponding *Authentica* " Offeratur " to *Cod.* 3,9 (*de litis contestatione*) 1; the other Novels, which are expressly speaking of the plaintiff, are *Nov.* 96 (= coll. VII, tit. 7 *de executoribus*) c. 1 with the corresponding *Authentica* " Libellum ", again to *Cod.* 3,9,1; and *Nov.* 112 (= coll. VIII, tit. 8 *de litigiosis*) c. 2, with the corresponding *Authentica* " Generaliter " to *Cod.* 1,3 (*de episcopis et clericis*) 25.[3]

These two problems were discussed by the glossators in their glosses, *summae* and lectures, but as several *solutiones* were proposed, this led to several *dissensiones* among the *domini*. A good exposition of the first problem which is a typical *contrarium*, and interests us chiefly, is to be found in the *Lectura Codicis* of the latest though certainly not the greatest glossator, Odofredus (ob. 1265).[4] In explaining the *Auth.* " Offeratur " he says:

[3] The only critical edition of the *Authenticae* in the Code is that by E. Herrmann in his edition of the Code (1843), the only editions of the Code without the *Authenticae* are the two by P. Krüger. His *ed. maior* (1877) is hereafter cited: Krüger.

[4] Quoted from Ed. 1552, ff. 141^{d}—42^{a}, checked by Dr. Kuttner on f.149^{b} of the MS *Par. lat.* 4561, the only one known to exist (see Kantorowicz, *Studies in the Glossators* [1938] 168 n. 86, correcting Savigny, *Geschichte des römischen Rechts im Mittelalter* V, 369).

Or Signori, super Autentica ista diligenter est [a] insistendum, et statim ad Autenticam istam ponam tria contraria . . . Et primo signatur contra hoc modo: vos habetis hic, quod offertur libellus reo vocato ad iudicium, reum debere satisdare iudicio sisti; set lex videtur contra D. qui satisdare cogantur, Sciendum in princ.[1] . . . Ad solutionem cuius contrarii quidam dicunt: quod ibi dicitur, hic corrigitur; nam olim, si possidebat immobilia, non satisdabat, hodie sic ut hic, quia illud ius vetus, hoc ius novum, [b] et non est novum [b] et cet., ut ff. de legibus et senatus consultis, Non est novum.[2] Que solutio non placet, quia legum correctio est vitanda, ut Infra de appellationibus, Praecipimus in fine,[3] et in corpore Autenticarum de administratoribus in fine,[4] et quia in corpore Autenticarum, unde hec Autentica sumitur,[5] non sunt aliqua verba, que patiantur,[c] quod velit [d] corrigere l. Sciendum.[1] Unde dicimus: quod dicit hec autentica, debet intelligi secundum determinationem illius legis Sciendum,[e] quia reus satisdat iudicio sisti, si non possidet immobilia, quia promptum est leges legibus concordare, ut Infra de [f] inofficiosis dotibus [f] l. unica,[6] et quia posteriores leges interdum secundum priores intelliguntur, ut ff. de legibus et senatus consultis, Set et posteriores.[7]

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a) Cod., 'et' Ed. b-b) Ed., om. Cod. c) 'ut intelligantur' similiave add.? d) Cod., 'velint' Ed. e) Cod., om. Ed. f-f) 'offi.do.' Ed., 'inosti.do' Cod.

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1) *Dig.* 2, 8, 15, pr. 2) *Dig.* 1, 3, 26: 'Non est novum ut priores leges ad posteriora trahantur.' 3) Cod. 7, 62, 32, 6. 4) *Nov.* 95, ep. 5) *Nov.* 53 c. 3 § 2. 6) *Cod.* 3, 30, 1. 7) *Dig.* 1, 3, 28.

This solution is practical but is not sufficiently supported by such purely formalistic reasoning. It operates with the usual maxims of interpretation of which the sources always provide a pair of contradictory ones, to be chosen according to the result desired. There are similar Accursian glosses which will be used in the following edition of a discussion among the glossators.[5] We shall see that Odofredus repeats the solution of Albericus, whereas the "quidam" whom he tries to refute are Bulgarus and Placentinus (or Pillius).

This discussion is to be found in three of the many collections of *Dissensiones Dominorum* and it is in one of them that we shall meet a hitherto unnoticed decision of our *contrarium* by Justinian. These

[5] Various old editions of the *Volumen* and three MSS of Gonville and Caius College, Cambridge, *248 (493), *293 (683), *600 (512), have been collated for this purpose, but in view of Torelli's impending critical edition of the Accursian Gloss on the Institutes no attempt was made to establish the authentic text. None of the numerous variants was material except the one mentioned *infra*, n. 3 of the apparatus.

collections, which date from the last quarter of the twelfth or the first quarter of the thirteenth century,[6] are:

(A): The *Collectio Chisiana,* here called *Coll. Chis. A,* contained in * *Cod. Vat. Chis.* E. VII. 218, thirteenth century, with 171 paragraphs according to its first editor, G. Haenel, who published it in 1834 in his *Dissensiones Dominorum;* our *dissensio* is his § 39 (p. 144-45). Ad. Rossello's abortive edition was never published and is of difficult access.[7]

(B): Another Chisian collection, contained in * *Cod. Vat. Chis.* E. VII. 211, thirteenth century, here called *Coll. Chis. B,* consists of c. 280 paragraphs.[8] The first 200 were edited by V. Scialoja in *Studi e documenti di storia e diritto* IX (1888), XI (1890), XII (1891); our *dissensio* is precisely the last, § 200 (*Stud. e doc.* XII, 269-70), but I have read and collated the rest of the MS with the result that both the printed and the unprinted parts of the collection contain hardly anything not already known from the other collections.

(C): A collection contained in at least five MSS of the fourteenth century—all closely related—and consisting of 470 paragraphs is everywhere called the Collection of Hugolinus, to whom it was attributed by the only two scholars who have studied it: Savigny, and Haenel, its editor;[9] since it is certainly not by Hugolinus and the true author can not be determined in this place, it shall here be called *Coll. Hugolino attributa* or the so-called Hugolinus. Our *dissensio is* Haenel's § 367 which he edited in the form of a note to his edition of *A,* purporting to give, but not succeeding in giving, the variants.[10]

[6] See for the present Neumeyer, *Gemeinrechtliche Entwicklung des internationalen Privatrechts* II (1916) 66-70.

[7] The first proofs, Introduction and §§ 1-49 (Haenel § 46), may be studied in the Library of Sendai (Japan). A set of the second proofs, in Florence, *Bibl. Naz.,* contains §§ 1-50 (Haenel § 47). A copy of the final proofs of the Introduction and §§ 1-2 was in the present writer's possession at Cambridge [and is now at the Library of Minnesota Law School.—ED.]

[8] 280, according to Rossello, p. 11, but the units are not always well defined.

[9] Savigny, *Gesch.* V, 67 n. 6; 252-58. Haenel, *Diss. Dom.* pp. xvii-xxiii, xlv-l.

[10] P. 145 note c. Possibly it is contained also in a collection discovered by Seckel, *Zeitschrift der Savigny Stiftung, Rom. Abt.* (= ZRG) XXI (1900) 226, of which he says nothing but that it is closely related to *B.*

Haenel's *Dissensiones Dominorum* are on the whole an admirable achievement for his time, but his edition of *A* can not be included in this praise. Scialoja was right in calling it " straordinariamente inesatto "; but he must have overlooked—as he did not mention it —that Haenel in using the difficult MS was forced by circumstances to rely (from § 30 or 31 onwards) on the copy of a dilettante of the name of Roestell.[11] Haenel's notes are very valuable even in this part of the work. Scialoja's edition was called " trefflich " by such a critic as Seckel and the reproduction of the MS is indeed reliable; but Seckel may have overlooked—as Scialoja did not mention it—that this MS seems to have been copied for him by Rossello.[12] Scialoja's notes are unsatisfactory. Neither the German nor the Italian editor succeeded in emending the corrupt text of our *dissensio* which is largely the same in the three collections and largely unintelligible in the previous editions. The following edition rests on the only surviving MSS of *A*, f. 119^{d}—120^{a}, and *B*, f. 15^{c}, and on Haenel's chief MS of *C*,**Cod. Cantab. Coll. Gonv. et Caii* 33 (139) f. 234 (p. 473)^{ab}. All the MSS are well written but demand great care in deciphering the tiny script which teems with abbreviations. Some of the obvious mistakes and inconsistencies of the scribes have been passed over in the notes.

In order to understand the dissension its *locus* must be determined. The proper place would have been, as in Odofredus, the *Authentica* " Offeratur," but the selection of the *locus* was largely a matter of chance and tradition. The Chisian Collections *A* and *B* give no clue as they lack any kind of order, but the so-called Hugolinus is arranged in the order of the titles of the sources. Here our dissension is the first of a series to the Digest (§§ 367-445), and is superscribed " D.Si quis cautionibus ". In this case the law is not indicated but the rubric of the following dissension adds " L.Sed et si quis § Quesitum ", i. e. l. 4 § 4. Indeed, the only fitting text in *Dig.* 2, 11 is l.4 § 5 " Si quis, cum iudicio sistendi causa satisdare non deberet " which the Accursian gloss illustrates by saying

[11] *Bullettino dell' Istituto di diritto Romano* II (1889) 128; see Haenel, p. lix. Scialoja's judgment was repeated by Rossello 3 ff., Patetta, *Rivista Italiana* IX (1890) 390 n. 3 and others.

[12] Seckel, *loc. cit.*—Rossello, *op. cit.* 57, speaks of " ed. Scialoja-Rossello "; see also pp. 3, 11. There is of course no reason to doubt that Scialoja would have acknowledged Rossello's share had he found the time to complete the edition and to write the Introduction.

"ut quia possidebat immobilia, ut supra Qui satisdare cogantur, Sciendum." [13] This agrees perfectly with the opening words of our dissension.

[a]D. Si quis cautionibus[a].[1]

Dissentiunt[b]. Dicunt quidam, quod hodie semper[c] satisdabitur, sive quis[d] sit possessor rei [e]mobilis sive immobilis[e], sive sit[f] actor sive reus. Nam et actor geminam prestat satisdationem, primam per Autenticam [g]positam in C. de litis contestatione, Libellum[2], secundam per Autenticam positam in C.[g] de episcopis et clericis, Generaliter[3]; postea vero et reus prestat satisdationem, nulla habita differentia, sive sit possessor [h]rei immobilis[h] [i]sive non[i], ut C. de litis contestatione, Autentica[k] Offeratur[4]. [l]*Placentinus* et[l] *Bulgarus*[m]. Alii vero[n] dicunt [o]obstare D. qui satisdare cogantur, Sciendum[5], et hanc legem per illam Autenticam Offeratur dicunt[o] non esse correctam[p] et intelligunt Autenticam secundum[q] quod dicitur in D. qui satisdare cogantur, Sciendum, id est, ut ita demum detur fideiussor, sive sit [r]actor sive reus, si non sit[r] possessor rei immobilis. Quod ex textu[6] [s]ipsius Autentici[s] [t]concipi potest[t]: ibi enim[u] dicitur, quod iudiciariam prestat satisdationem secundum quod iudici visum fuerit. *Albericus*[v]. *Alii* dicunt [w]idem quod Albericus[w], set faciunt relationem[x] in[y] Autentica ad[z] actorem et non ad reum, hoc modo: 'prebitis sportulis et [aa]data fideiussione[aa], ab actore[bb], [cc]secundum predictas Autenticas[cc] Libellum, Generaliter, [dd]et non ab reo[dd]. Set hodie sopita videtur istorum questio per constitutionem Grecam tit. de sportulis, que incipit: 'Si quis [ee]imperiali mandatu[ee]';[7] illa enim cum veteri lege[5] concordat.

Rub. a-a) C, om. A B; quae ibi scripserunt editores, sc. 'An possessores rerum immobilium satisdare cogantur?' invenit Haenel quem secutus est Scialoja. b) C, 'Differunt' A B c) A B, om. C. d) A C, om. B. e-e) A B, 'imm. s. m.' C. f) om. C. g-g) nihil praeter 'positum ('pon.' A) in C.' habent A B, penitus om. C propter homoioteleuton; supplevi e gl. Acc. ad Inst. 4, 11 (satisdationibus), 2 v. 'nullam satisdationem' sec. cod. Cantab. Coll. Gonv. et Caii 248 f. 58[c]: 'Numquid actor aliquam facit satisdationem? Respondeo, quod sic, duas. Primo, quod litem contestabitur usque ad duos menses a die libelli porrecti, ut in Aut. de executoribus et his § 1 ["coll. VII., que est Aut. C. de litis contestatione, Libellum" add. edd.]. Aliam, quod persistet usque ad finem . . . ut in . . . C. de episcopis et clericis Aut. Generaliter'; similiter codd. 293, 600 eiusdem Collegii et edd. Cf. etiam infra n. cc-cc, ubi Auth. Libellum 'predicta' dicitur. h-h) B C, om. A. i-i) A B, om. C. k) A C, om. B. l-l) 'p. et' B, cf. gl. Acc. ad Nov. 53 c. 3 § 2 v. 'personali fideiussione' sec. codd. et edd.: 'Set Placentinus dicebat illam [sc. Auth. Offeratur, "istam" edd.] simpliciter loqui'; 'py. et' A, 'et py.' C. m) 'b.' A B, 'B.' C. n) B C, 'non' A. o-o) hic vel antea permulta excidisse suspicatus est Haenel (§ 39 adn. z)

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[13] I am indebted to Prof. Buckland for having found this text.

qui ex glossa Acc. ad Auth. Offeratur v. 'fideiussione' quaedam minus apta attulit. Ego supplevi e Lectura Odofredi super Auth. Generaliter (ed. 1552 vol. I f. 26ª num. 7): 'dicimus, quod illa l. Sciendum non corrigitur per hanc Aut., set hec Aut. intelligitur sec. determinationem illius legis'; similiter ad Auth. Offeratur (supra p. 48) p) 'correctum' A B C, sed vide n. precedentem. q) A B, om. C. r-r) om. A B C, tamen hic quae exciderunt e contextu planum est; 'si non' pro 'sive' em. Haenel ex coniectura. s-s) C, 'aut' A B. t-t) scr.? 'convinci potest' A, 'concipitur' B, 'convinci et concipi potest et colligi potest' C. u) A B, om. C. v) 'al.' A B C. Odofredus pro hac opinione Iohannem et Azonem laudat in Lectura Codicis super Auth. Generaliter (num. 7). w-w) B C, om. propter lacunam A. x) B C, 'relativum' A. y) A C, om. B. z) A C, 'in' B. aa-aa) B C, 'data fideiussore' A. bb) A C, 'actione' B. Desinit hic A. cc-cc) 'scilicet predictis in aut.' B, 'secundum predicta aut.' C. dd-dd) 'et non ad reum' C, om. B. Desinit hic C. ee-ee) 'imperialis mandatum' B.

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1) *Dig.* 2, 11, (4, 5). 2) *Nov.* 96, 1 ad *Cod.* 3, 9, 1. 3) *Nov.* 112, 2 v. 'actor' ad *Cod.* 1, 3, 25. Acc. *l. c.* (ad *Inst.* 4, 11, 2) add. sec. cod. Cantab. Gonv. et Caii 248 'que due non sunt in usu'. similiter edd. et cod. 600, om. cod. 293. 4) *Nov.* 53, 3, 2 ad *Cod.* 3, 9, 1. 5) *Dig.* 2, 8, 15, (pr.). 6) id est ex ipsa *Nov.* (c. 3) ubi legitur: 'iudiciariam cautionem exponentem sicut qui de his iudicat perspexerit' (textus vulgatus). Haec non extracta sunt in Auth. Offeratur, multo minus in Auth. Generaliter quam h. l. laudat Scialoja. 7) *Cod.* 3, 2, 4 sec. versionem latinam deperditam.

As in many other cases the collector of the dissension does not side with any one of the opinions. In this case he had a special justification for keeping in the background, as he had found an authoritative solution of at least one of the two problems, our *contrarium*. It is clear that the "vetus lex" must be the passage attributed to Macer on the exemption of the landowner, the same we have seen Odofredus call the "ius vetus". But what is the "constitutio Graeca" which is cited in *B*, with a Latin initium, and, for all we know, in no other writing of the glossators? "Hodie" does not refer to medieval law but was technically used for denoting the prevailing law, generally the law of the Code or the Novels, as opposed to that of the Digest.[14] But no cause is known in which the expression "constitutio Graeca" was used for anything but the Greek laws of the Code; the *dissensio* must therefore refer to a Latin

[14]See e. g. M. Conrat (Cohn), *Epitome Exactis regibus* (1884) p. ccx f.: *id. Geschichte der Quellen und Literatur des römischen Rechts im Mittelalter* (1891) 557 nn. 5, 6; 572 n. 1.

version of a Greek constitution of the Code. Scialoja says in the last of his notes:

> Non so bene a che si riferisca questa citazione. Forse alla Nov. 17 c. 3? O, come mi pare più probabile, all' *epitome Juliani* 47 c. 1. (ediz. Haenel) che incomincia: *si quis ex divina iussione?* Un'accenno alla legge restituta del codice *De sportulis* 3, 2, 4 apparisce meno probabile.

But each of these three suggestions must be rejected for several reasons. *Nov.* 17 c. 3 and *Epit.* 47 c. 1 are from the *Authenticum* and Julian, both purely Latin works, the Greek originals of which were completely unknown to the glossators; neither of the two texts has anything to do with *Cod.* 3,2, the only title *de sportulis* in the Roman sources; neither of them deals with the exemption of the landowner from giving security.

But the third suggestion, though considered the least probable by the editor, is much nearer the truth. *Cod.* 3,2,4 is a Greek constitution, it is a law in the title *de sportulis;* the Greek initium is similar to the Latin initium quoted in our dissension, and the text confirms the old law. The Greek initium may well have been rendered in Latin by a sentence beginning " Si quis imperiali mandatu " (sc. " publicum vel privatum negotium ei commissum exsecuturus conveniat quidem reum "). Finally, the relevant text is that in § 3:

> ἀλλ' εἰ μὲν ἀκίνητον ἔχοιεν οὐσίαν ἀξιόχρεων οἱ ὑπομνησθέντες, ὅρκου γραμματεῖον ἐκτίθεσθαι μόνον. εἰ δὲ οὐκ ἔχοιεν, τηνικαῦτα μεν ἐγγύην ἄχρι τῆς ἤδη κρατούσης ποσότητος παρέχειν.

i. e.: " Sed si quidem *immobilem idoneam possessionem* habent conventi, iusiurandi tantum scripturam exponant; sin autem non habeant, *fideiussionem* ad dudum constitutam quantitatem praebeant." The whole text is designated as " constitutio Greca " in six of the oldest MSS of the Code, which have a lacuna here;[15] the first and the last part were restored by modern critics since Antonius Augustinus and Cujacius[16] from the *index* in the *Basilica,* the middle part (§ § 3-5) from the Greek *lex gemina, Cod.* 1,4,26 § § 11-13. Both laws were issued by Justinian on June 24, 530.

It is true that a Latin translation or epitome of *Cod.* 3,2,4 has not yet been found, and it is this circumstance which may have misled Scialoja. He ought to have said that though the author of

[15] Krüger mentions his MSS *M R S,* but not *L P Y,* indicated by Herrmann.

[16] Details in Herrmann *h. l.* and on *Cod.* 1, 4, 26 note d.

the *dissensio* could not have meant *Cod.* 3,2,4 in its original Greek text he must have meant a Latin version of it which has since been lost. This is confirmed by the similar fate of the preceding Greek constitution, *Cod.* 3,2,2. Here too, some of the oldest MSS have a lacuna, indicated as usual by the words " constitutio Greca " or the like. In a fragmentary MS of *additiones* of the Code, now at Sheffield, the author after having commented on l. 1 continues: " non tractatur de sportulis, quia de eis inped..."[17] This Greek constitution, too, was partly restored by Cujacius in his *Observationes* (lib. XII c. 22) from an *index* in *Bas.* 7,6,20 and hence has found its place in the editions of the Code. Soon afterwards (1562) Contius printed a Latin epitome of this constitution in his edition of the Code, but he did not recognize its relation to the tit. *de sportulis* and placed it where he had found it in one of his MSS, viz. at the end of *Cod.* 3,43 (*de aleae lusu*); there it remained in the following editions. In 1833, however, Biener, after having found the same text at the same wrong place in the MS *Vat. Pal.* 758 (thirteenth century, with the gloss " ista lex non legitur "), said rightly (though he gave no reasons) that its proper place was *Cod.* 3,2,2,[18] and there it was put by the latest editions (Beck, Herrmann, Krüger), in the text or in the notes. Some years ago this epitome was found again at the wrong place in a MS of the Code which had been sent by a Munich dealer in MSS, Herr Loeb, to Otto Lenel, then at Freiburg i. B., who showed it to me; but I took no copy and cannot say what has become of the MS.

The epitomator did not of course take the trouble to look into the Byzantine indexes and to translate from these;[19] he simply worked on a MS of the Code which still contained some or all of the *Graeca.* Such a MS was e. g. that of Bulgarus, for there is a gloss to *Cod.* 9,8 (*ad l. Jul. mai.*), 6, of which only the Latin portion has come down to us, saying: " Ante has leges legitur a Bulgaro Greca constitutio set alii non habent."[20] The translation of C. 3,2,4 was

[17] The passage was kindly communicated to me by the owner of the MS, Mr. A. M. Woodward, of the University of Sheffield.

[18] *Beiträge zur Revision des Justinianischen Codex* (1833) 77 f.

[19] This is Krüger's opinion (p. xxi f., reluctantly accepted by Conrat, *Geschichte* 121 n. 2). Krüger would probably have given proofs if he had had any. See also his note on p. 516 after § 26.

[20] Quoted from certain old editions (Charondas 1575, D. Gothofredus 1583), from a MS of Steph. Auredanus; the modern editions quote a Viennese gloss

probably made in the twelfth century. It is true that parts of one Greek constitution, *Cod.* 1,1,7, were translated as early as the time of Justinian.[21] But it is far more likely that our epitome had the same origin as the five other translations which have hitherto come to light: the one just mentioned of *Cod.* 3,2 (*de sportulis*), 2 and those of 3,10 (*de plus petitionibus*), 2; 3,43 (*de aleae lusu*), l.1 and l.2, and 6,4 (*de bonis libertorum*), 4.[22] One of them was known already to Bulgarus,[23] and is quoted by his pupil, Johannes Bassianus, as the work of "Petrus de Candona".[24] Petrus was a Cardinal of Pope Alexander III (1159-1181), born in Cardona near Barcelona.[25] The same Petrus is known as the translator of *Cod.* 3,10,2.[26] The remaining two translations are those of the two laws of *Cod.* 3,43, the title at the end of which the epitome of *Cod.* 3,2,2 was each time found, and this epitome itself closely precedes *Cod.* 3,2,4. This text, too, seems to have been not a literal translation but an abridgment, since it begins with "Si quis imperiali mandatu" whereas even the Byzantine index would allow us to expect "Si quis imperatoris vel alicuius gloriosissimorum magistratuum mandatu." Thus these translations are all closely connected, and since two of them were certainly made by Petrus de Cardona they probably were all made by him. A striking analogy

which however does not mention Bulgarus. See Savigny IV, 408 note a; Biener, *Gesch. d. Novellen* (1824) 579; and, on Haloander's MSS of the Code with Greek constitutions, Biener 343.

[21] Conrat, *Geschichte* 6 n. 4 (new edition: *ZRG* XXXIV [1913] 27 f.) and 120 f.

[22] Biener, *op. cit.* 578-81; Krüger p. xxi; Conrat, *Geschichte* 121 n. 2.

[23] Charondas from the MS of Auredanus (above n. 20); Biener, *op. cit.* 579; Savigny IV, 408 note a (who both believed it to be a Justinian original); Krüger (who contradicts himself by dating these translations p. xxi from the 13th century) 514 line 35 col. 2 v. "Bulgarus", 516. See also Krüger 295 line 16.

[24] D'Ablaing, *ZRG* IX (1888) 41.

[25] Valls-Taberner, *Mélanges P. Fournier* (1929) 744, 746. [Kehr, *Papsturkunden in Spanien* I (1926) 518, 520; Post, *Speculum* XVIII (1943) 217 n. 1. He might be the master "petrus de cardo" who is quoted (c. 1205-6) in a gloss by the canonist Bernard of Compostella, MS Modena, *Est. a.* R.4.16, cf. Kuttner, *Traditio* I (1943) 317 (without identification). ED.]

[26] Hach, *Zeitschrift für geschichtliche Rechtswissenschaft* V (1825) 213; Savigny IV, 409 note b; Krüger 246 line 27.

is offered by the vulgate translations of the *Graeca* in the Digest. They were formerly believed to date partly from the time of Justinian or at least from pre-Bolognese time, but in fact they were made by Burgundio of Pisa, again in the second half of the twelfth century.[27]

The Justinian constitution has not attracted much attention among the modern students of Justinian law,[28] although it is a striking illustration of the class character of late Roman procedure.[29] It may also help to show that the whole passage attributed to Macer in *Dig.* 2,8,15, pr., which must have been of great forensic importance, is more or less interpolated.[30] Both texts must certainly be read jointly: it is the qualification that *possessio* of land must be *ἀξιόχρεων*, *idonea,* in order to exempt from giving security, that makes sense of this privilege. The minimum value seems to have been not less than 50 Pounds, if we may read the texts in the light of the Byzantine index both of this and of another Greek constitution of unknown date.[31] At the same time the quotation of one of these *Graeca* is interesting for the student of the methods and the literature of the glossators. It shows their eagerness to master the sources of the Justinian law in its entirety and in its most technical details though it remained true that "Graeca non leguntur," i. e. were not made the object of lectures by the Bolognese, even if accessible through private translations. But it also shows that their lack of historical and linguistic knowledge and interest was to a certain degree made good by their dialectical ability: the Justinian constitution confirms precisely the restrictive interpretation of Macer's passage by the most acute of the Bolognese interpreters, Johannes Bassianus.

[27] Savigny III, 482 n. 6; IV, 403-08; Mommsen, *praef. ad Digesta* (1870) vol. I add. IV (p. 35*); Fitting, *Sitzungsberichte der Akademie der Wissenschaften zu Berlin* (1894) 817; Kantorowicz, *Zur Entstehung der Digestenvulgata* (1910) 25 (§ 5 n. 28); Seckel, *Distinctiones Glossatorum* (1911) 339 n. 3.

[28] It is mentioned by Steinwenter, *Studien zum römischen Versäumnisverfahren* (1914) 168 n. 1, 170 n. 1; by Collinet, *La procédure par libelle* (1932) 149f. and others.

[29] See e. g. Wenger, *Institutionen des römischen Zivilprozesses* (1925) 270.

[30] See the writings of Albertario and Bonfante cited in the *Index Interpolationum.* See also, on the initium "sciendum est", Pringsheim, "Beryt and Bologna," in *Festschrift für O. Lenel* (1923) 249. But I cannot see how the whole *principium* can be cut out without overthrowing the rest.

[31] *Bas.* 7, 6, 20; *Cod.* 10, 11, 8, 7.

THE DEMOCRATIC SPIRIT OF THE ROMAN LAW AND THE COMMON LAW *

FEW problems are more fascinating than the question why Fascism took root in certain countries and not in others. Often the theory is freely advanced that it is the Common law that preserved the Anglo-Saxon countries from this plague.[1] This theory needs no refutation; for it overlooks the fact that Switzerland, Sweden, Belgium and the Netherlands have remained democratic in spite of their Civil law tradition. But although erroneous, the theory is stimulating because it induces us to discuss certain fundamental problems of legal history and philosophy which we may state in the following way.

Is it possible to ascribe to a legal system as such a democratic character or, as one often says, a democratic spirit? The legal system is after all, only a part of the cultural life of a nation, an expression of her ideas about the good life. Philosophically this relation may be interpreted in various ways. One may assume with the historical school that a metaphysical "spirit of the people" is at work while the law is gradually being developed; or the contents of the law may be explained as the result of the more or less conscious actions of more or less selfish individuals or groups, as was done by the philosophers of the eighteenth century and by Marx; or finally, the legal system of a people may be regarded as part of a cultural system, in which every element is dependent upon the other. Different as these theories may be, they agree in one point. As they see it, the legal system is much more an instrument than an independent agent, and it is hardly possible to ascribe to it a spirit of its own.

* Paper read at the meeting of the Riccobono Seminar of Roman Law in America, Washington, D. C., April 9, 1945.

[1] Quirinus Breen, *Oregon Law Review*, XXIV (1944), 57 has collected a few examples. McIlwain presents the correct facts, but the title of his article in *American Historical Review*, XLIX (1943), 23: "The English Common Law Barrier Against Absolutism" is apt to be misinterpreted.

In this paper I do not want to enter into an abstract philosophical discussion, but to consider the problem in a concrete and pragmatic way: first, in what sense can we distinguish between the "spirit of the law" and the "spirit of the people" in the concrete instances of the Common and of the Roman law, and secondly, which of the democratic institutions may be regarded as having been created by one or the other of these "spirits"?

Both in Roman law and Common law we observe two main groups of legal rules and institutions. One group is the result of political actions and of movements of law reform. Another set of rules and institutions has been gradually developed by the legal profession. In some cases it is difficult to draw the dividing line: for instance the place of the edict of the praetor may be doubtful. I believe that it belongs to the second group. For it was gradually developed from case to case and, in issuing it, the praetor followed not the pressure of political forces or parties but the advice of trained lawyers. Be that as it may, in a general way the distinction of the two groups of rules and institutions seems to be as clear as any in the field of social sciences can be. If we now try to apply to these two groups the term of "the spirit of the law," we find that it can not be applied to the first group. It would be misleading to speak of the spirit of the law in cases where the law was created by political reform. Here one must speak of the spirit of the political forces which found its outlet in the creation of legal rules. Quite different is the second case. Since we do not know to whom the particular institution shall be ascribed, we are well entitled to speak of the spirit of the law.

Having thus delineated the reign of the "spirit of the law" we shall test the various institutions which are regarded as characteristic of a democratic system as to whether they belong to the first group, the realm of political action, or to the second group, the domain of the spirit of the law. The term, democratic institutions, shall be taken in a loose way as meaning all institutions which, according to our experience, are characteristics and safeguards of a social pattern in which the basic values of life are respected.

Yet another preliminary remark is necessary. Both the Roman and the Common law have a history of many hundred years. It will be our duty in every case to point out of which period we are speaking. In the field of Roman law the main emphasis will be laid upon the two centuries preceding and following the birth of Christ.

Nowhere is the spirit of the law more clearly expressed than in the ideas about the function of the law in the life of the people. Those ideas are first formulated by philosophers and philosophically minded lawyers. Later they are accepted by the legal profession and become a general instrument of argumentation. In theory they are certainly representative of the "spirit of the law". Whether they are actually effective is, of course, another question. In the realm of the Common law the classic theory about the functions of the law is the doctrine of the supremacy of the law. It is said to be one of the distinctive features of the Common law [2] and one of the great bulwarks of democracy. To prove this theory, it is customary to relate the story of the conflict between Lord Coke and King James. But a closer scouting of this doctrine immediately meets with many doubts. The doctrine which was used by Lord Coke in his conflict with the king was certainly not a Common law theory in the sense that it was proper to the Common law. It was the natural law theory, common to all legal thought of the Middle Ages, which says that there is a law existing without human enactment and beyond its reach. It is a theory which was first expressed by Greek and Roman philosophers and transmitted to the Middle Ages through Cicero. If we regard Cicero as the representative exponent of Roman jurisprudence it should be called a Roman theory on law, not a Common law theory.

To name it a Common law theory might however be justified by another consideration, namely that in Common law it was a living force whereas in Roman law it was nothing but adornment. The latter is, of course, granted. For we know of no case where Cicero's theory of natural law was used to deduce the inapplicability of a rule of positive law. How far natural law theories were used to implement the law is another much debated question. But is the situation different in the countries of the Common law? I am afraid that there a single historical instance was viewed without the necessary historical perspective. It may be true that Coke's theory contributed to the checking of royal absolutism. But this contribution is a minor one. In England, absolutism was checked by the axe of the executioner in a process which has little in common with Coke's theory of the supremacy of the law, even as it was destroyed in France by the blade of the guillotine. Coke's theory of the supremacy of the law was a very temporary affair. It was suc-

[2] R. Pound, *The Spirit of the Common Law* (Boston, 1921), II, 64-65.

ceeded by Cromwell's dictatorship and later by the theory of the omnipotence of Parliament. In England there is now, for several hundred years, nothing left of Coke's theory but his words. In America the situation is somewhat different. It has rightly been said that the Bills of Rights are the expression of the same philosophy.[3] But bills of rights may be changed by constitutional amendments and, consequently, not the law of the constitution is supreme but the powers which may change the constitution, namely the people.

The theory of the supremacy of the law as it was understood by Lord Coke, was in truth an argument in a political discussion and it is surprising that it is reckoned among the fundamental characteristics of the Common law. This can be explained only by a subconscious equivocation. Supremacy of the law may be understood in a looser and less philosophical sense. In this sense it is a general principle regarding the administration of justice and postulates that every governmental act, especially every punishment, must be preceded by a legal ritual in which the conditions for the act have been ascertained. Shortcuts to the socially desirable goal are not permitted even if the final result should be in conformity with substantive law. This is *due process* in the formal sense of the clause[4] which is indeed one of the great bulwarks of freedom and and one of the striking features of the Common law. If the Germans had had more respect for due process Hitler could hardly have established his tyranny so easily. But if respect for due process is one of the glories of the Common law, it is likewise one of the lights of Roman law of the classic period. Cicero and other authors point with pride to the respect of the Romans for legal procedures as against the arbitrary actions of the Greeks and the orientals.

But respect for the legal form tends to develop into delight in formalities. Then the law acquires an esoteric character and only a few with specialized training are able to understand and to handle it. To the mass of the people the law becomes a mystery viewed with suspicion. Neither the Roman nor the Common law were able to avoid this cliff. Even today deeds, wills, bonds, and con-

[3] McIlwain, *op. cit.* 30; Pound, *op. cit.* 75.

[4] As to the right of expropriation, see R. von Ihering, *Geist des römischen Rechts,* II, 1 (Leipzig, 1894), 72, 76; F. Schulz, *Principles of Roman Law* (Oxford, 1936), 161.

tracts are full of redundant words of apparently magic significance. I say magic, because no layman can ever see the relation between the intention of the instrument and what it appears to say.[4a] The traditional legal rules use words which are entirely unknown to the common language, or common words with a meaning absolutely different from common usage, as e. g. the rule in Shelley's case. From the point of view of style the Roman lawyers are much better, their language is lucid and simple, but they are often so concise and presuppose so much with the reader that, again, only the trained expert is able to understand the law and to make good use of it. In Rome this situation was alleviated to a certain extent, as Ihering[5] has pointed out, by the omnipresence of the lawyer who in classical times was supposed to offer his services gratuitously. Of course, reality did not correspond to theory.

If we now enter into a discussion of more concrete rules and institutions we begin properly with the principle of equality of men. The social structure of a community in general, regardless whether there are slaves, serfs, nobles with privileges, etc., is determined by the constitution and the forces which influence the framing of the constitution. Here the lawyers exercise hardly more influence than other members of the community. Their influence becomes discernible within the limits set by the general principles of the constitution. They may, so to speak, take to the tendencies of inequality expressed by the constitution and develop and refine them —as was done by the German lawyers of the Middle Ages—or they may disregard them as far as it is possible within the framework of the constitution. The latter was done by the lawyers of the Roman and the Common law. Both Rome and England were aristocracies, but the privileges of the nobility were not expressed in legal terms. Generally there is only one law for all classes of the population.[6] There is only one law of property, one law of contracts,[7] one law of inheritance, and one law of crimes[8] for the whole

[4a] Glanville Williams, "Language and the Law," *Law Quarterly Review*, LXI (1945), 71, 78.

[5] *Op. cit.* II, 2, 416.

[6] Ihering, *op. cit.* II, 1, 96f.

[7] Senators were excluded from certain professions, see Brassloff, *Sozialpolitische Motive der römischen Rechtsentwicklung* (Vienna, 1933), 12. See further Ihering, *op. cit.* II, 1, 101.

[8] Mommsen, *Römisches Strafrecht* (Leipzig, 1899), 1032.

population. Only the later Roman law developed various distinctions, especially the distinction between *honestiores* and *humiliores*.

We have omitted one reason for discrimination: sex. Here the Common law compares unfavorably with Roman law. Both legal systems started from institutions which entirely submitted the wife to the husband, the doctrines of the *uxor in manu* and of the *feme coverte*. But the Roman lawyers, through gradual improvements and inventions of various devices, finally emancipated women to such an extent that the classical law could be introduced in any modern society without great changes.[9] In the Common law countries all these reforms were introduced by legislative acts.

The other basic rights of a democratic society, freedom of religion, freedom of speech, freedom of association and assembly are in still closer relation with the constitution than the principle of equality of men. As far as they exist they are the outcome of constitutional debates and conflicts: the influence of the lawyers and of the legal thinking on their development is small.

This influence can be seen with much greater clearness in the many rules and institutions which determine the relations between the individual and the community. No community can exist, especially not in times of war, if the officials acting for the community do not enjoy a certain freedom of action and discretion. To grant the officials such latitude of action without impairing the freedom of the citizen is the most difficult and the most sublime task of the lawyer. He must find the legal device which makes it possible to steer between the Scylla of arbitrary bureaucracy and the Charybdis of obstruction by egotistical interests of all measures which must be taken in the public interest.

The great palladium of the freedom of the citizen in the Anglo-Saxon countries is the *habeas corpus*. It secured the liberty of the Englishman at a period when the inhabitants of the continent were still subject to *letters de cachet* and other arbitrary measures of the absolute monarch. There remains only the question whether we owe the institution in its modern sense to the working of the legal mind or to political action. The answer is that *habeas corpus* became what it is through statute, the *Habeas Corpus Act* of 1697.[10]

[9] Schulz, *Principles*, 209. His view that women were not allowed to take recourse to the *provocatio ad populum* is probably erroneous.

[10] And other statutes, see Holdsworth, *History of English Law*, IX, 119f.

By Common law *habeas corpus* is a means to protect the jurisdiction of the Common law courts,[11] not a device for guaranteeing the freedom of the citizen. This was decided in Darnel's Case[12] when it was held that the King's pleasure is a sufficient return.

The corresponding institutions in Roman law are the *provocatio ad populum* and the tribunician intercession.[13] Both of these institutions originated in the same way as *habeas corpus*. They are the result of political conflicts.

A second means to protect the individual against harmful action of the officers of the community is the law suit against the state. Both Roman [14] and Common law were extremely reluctant to admit this remedy. In Rome it was impossible to sue the *populus Romanus*, only suits against the imperial *fiscus* were admitted. According to Common law the sovereign can not be sued without his consent. What exceptions to this admittedly inequitable rule [15] there are, have been introduced by legislative reform.

A third bulwark against arbitrary action of the government officials which may be mentioned in this connection is the rule, *nulla poena sine lege*. Here again Roman and Common law agree. They admit the principle only in a general way, not in the strict sense given to it by the continental lawyers of the nineteenth century.[16] Cicero (*In Verrem* 2, 42, 108) gave it the following formulation, which expresses the views of the Common law[17] just as well as that of the Roman law: "neque in ulla (lege) praeteritum tempus reprehenditur, nisi eius rei quae sua sponte scelerata aut nefaria est, ut, etiamsi lex non esset, magno opere vitanda fuerit."

Habeas corpus and suits against the state are particularly important in the field of administration. The democratic and liberal

[11] *Ibid.*, 109.

[12] (1627) 3 *S. T.* 1.

[13] Schulz, *op. cit.* 163.

[14] *Ibid.*, 177.

[15] See the series of articles published by Professor C. M. Borchard in vols. XXXIV and XXXVI of the *Yale Law Review*, vol. XXVIII of the *Columbia Law Review*, and *Law and Contemporary Problems*, IX (1942), 170.

[16] Cf. Schulz, *op. cit.* 173; E. Levy, *Gesetz und Richter im kaiserlichen Strafrecht* (Milan, 1938), 93; *Dig.* 50, 16, 131, 1; *Cod.* 1, 14, 7.

[17] Jerome Hall, "Nulla poena sine lege," *Yale Law Rev.* XLVII (1937), 165, 171.

character of the judicial function is mainly dependent upon the composition of the judicial bodies and the character of the procedure. It is not the spirit of the law as we understand it in this paper, but the constitution which decides the question who shall be judge in civil and criminal matters. For this reason I shall limit myself to some incidental remarks. Both in Rome and in England the sovereign assembly acted as the highest judicial body. In Rome it was the *populus* assembled in the various forms of *comitia* which decided in criminal cases whether the judgment of the magistrate should be confirmed or not. In England, Parliament continued the practice of bills of attainder until 1798,[18] and even in the United States, in spite of the principle of separation of powers, Congress, on the occasion of private bills, performs some functions which might be termed judicial.

Both in Rome and in England the performance of judicial functions by the legislative proved to be unsatisfactory and was replaced to a large extent by a jury system. In spite of its many shortcomings, which were known in Rome no less than in England and America, it introduces a democratic element into the judicial system,[19] because it constitutes a link between the law and the population. If we ask again the question whether the introduction of the jury system is due to the working of the lawyers or to legislative reform we do not receive a clear-cut answer. In Rome the use of the jury in civil matters—the *iudex privatus*, the *centumviri* and the *decemviri*—goes back to periods of which we possess no reliable historical information. Many theories have been propounded to explain the origin of these institutions. This is not the place to discuss the relative merits of these theories. It is sufficient to say that we have little reason to ascribe the creation of these bodies to legislative reform. Thus we may regard them with some justification as due to the legal spirit. As to the origin of the Roman jury in criminal trials there can be no doubt. It was created by legislative reform, first for the suits of provincials against their governors, later for most of the ordinary crimes. In this connection it is interesting to observe how many of the technical problems connected with the use of the jury, selection of the jurors,

[18] Plucknett, *A Concise History of the Common Law* (3rd ed. London, 1940), 184.

[19] Holdsworth, *Hist.* I, 349.

empanelling etc. were solved by the Romans in almost the same way as by us today. Only one qualificaton must be made. The Roman jurors were selected from a small group, the senators and later the knights and *tribuni aerarii*. But, of course, neither in England nor in America have the juries always been truly representative of the whole population.[20]

In England the jury was first an instrument of royal administration, employed to safeguard the rights of the crown.[21] Rightly Plucknett calls it a strange twist of history [22] that this institution has finally become a bulwark of the citizen against the government, or is at least regarded as such in this country. This change came about gradually, mainly through the action of the judges who after the abolition of the ordeal by the Fourth Council of the Lateran were searching for new means of proof. The jury as it exists today in the Anglo-Saxon countries can indeed be ascribed to the spirit of the legal system, i. e. the gradual work of the legal profession.

The same is true of the bulk of the procedural rules and principles which are the safeguards of a fair trial. They are the accusatory principle, i. e., the separation between the investigating and prosecuting agent, on the one hand, and the man or body passing judgment, on the other;[23] the right of the defendant to offer his own evidence[24] and to be confronted with the evidence offered by the prosecutor, including the right to cross-examine the witnesses of the prosecutor;[25] the right to be defended by counsel and, the most important of all, the principle that the position of the accused is not impaired as long as he is not convicted. In all these points Roman law[26] is almost identical with the Common law and it seems that there too we should credit the legal profession with most of these achievements.

[20] Holdsworth, *Hist.* VI, 214: "Charles and James II succeeded in getting control of the machinery by which juries were appointed."

[21] Holdsworth, *Hist.* I, 312f.

[22] *Op. cit.*, 105.

[23] Mommsen, *Römisches Strafr.* 346, 421, 422.

[24] Only in the course of the seventeenth and eighteenth centuries did the prisoner acquire this right completely, see Holdsworth, *op. cit.*, I, 325, 336.

[25] Mommsen, *op. cit.*, 431; Schulz, *Principles* 205.

[26] Trials in the absence of the accused were not permitted: Mommsen, *op. cit.*, 333, 335.

As to the principle that the status of the accused is not impaired before he is convicted, a few additional remarks are indicated. During the earlier period of the Roman republic the accused was required to name a *vadimonium*,[27] later he was left in freedom without it.[28] Thus Roman law was even more liberal than the Common law which makes freedom pending trial dependent upon bail, an institution which introduces a somewhat economic aspect into a question that should be decided upon other considerations than the ability of the defendant to furnish bail.

A still more serious violation of the principle that the defendant's position is not impaired as long as he is not convicted would be to subject him to torture. In theory both Roman and Common law strictly forbade the use of torture. In Rome the actual practice seems to have corresponded, at least in republican times, to this theory[29] whereas in England during the sixteenth and seventeenth centuries torture was only too often applied.[30]

This leads to a discussion of the general traits of punishments in use. In this respect the Roman law of the late republic is far superior to the Common law during its formative period. It abhorred not only "all cruel or unusual punishment," but even the death penalty since the latter could always be evaded by voluntary exile. "Roman criminal law was, so far as citizens are concerned, the mildest ever known in the history of mankind."[31] But this difference must probably be ascribed to the difference in the spirit of the times.

There remains however one great difference between Roman law and Common law in the field of both criminal and civil procedure. The classic Roman law does not know any rules of evidence which could be compared to those which the Common law has so profusely developed. To call these rules of evidence democratic would certainly be an exaggeration, although they may not be directly illiberal except in the sense that they give the procedure an overtechnical and esoteric character.

[27] *Ibid.*, 328.

[28] *Ibid.*, 328; Strachan-Davidson, *Problems of Roman Criminal Law* (Oxford, 1912), I, 163; II, 24.

[29] Schulz, *op. cit.*, 207.

[30] Holdsworth, *Hist.* V, 185.

[31] Strachan-Davidson, *op. cit.*, I, 114.

In a general way this latter reproach must be made to the civil procedures of the Common law and of the Roman law alike. Both are characterized by a system of forms of action. There are many differences between the procedure by *formula* and the procedure by writ. But in one respect they are similar: an abyss was opened between the substantive law and the procedural form by which it can be enforced, in Common law even more than in Roman law. Only the initiated knew which were the appropriate forms to be applied in any given case. In the course of time these forms became more and more complicated, and their relations to the substantive law, less and less clear. Finally in both systems no solution was left but to abolish the forms of action by legislative fiat.

The technical character of law is a problem of general nature. It is of course true that many fields of the law deal with matters so complicated and involved that no regulation can be simple and understandable to the layman: e. g. the rules which are destined to protect the stockholder against the managers or promoters of a corporation. In other fields however, involved language and complicated lines of thought are due not to the difficulty of the subject matter but to the incapacity or unwillingness of the legal profession to think a problem through and give to the correct solution the most appropriate and simple expression. Many of the rules of the Common law on procedure belong definitely to the second group. Only since the introduction of modern rules of court and the small claims courts do we have systems of procedures which are not self-serving, but instruments designed to bring about the realization of the substantive law. If the Roman law of the classic period is less formalistic, its praise needs the qualification that writing material was too precious to allow much procedural formalism in the modern sense of the word.

If a legal system is too formalistic it becomes plutocratic; for only the rich are able to hire the specialists who are in a position to exact exorbitant fees. I hardly need to recall the outrageous expensiveness of the English legal procedure. But this plutocratic character of the Common law, and of the Roman law as well, is betrayed not only by the formal structure but by many of the substantive rules. "Ius est scriptum vigilantibus" is their maxim—a maxim which sounds convincing upon its face but forgets that there are many who have neither the time nor the education to be viligant. In innumerable cases the inexperienced and the economically weaker

party needs the protection of the law. Of the rules which we regard as a necessary part of any legal system which is conscious of its social responsibilities, very few have been developed by the lawyers of the Common law or the Roman law upon their own initiative.[32] It was legislative reform which brought the famous drop of social oil into the two legal systems.

We have certainly not yet exhausted this broad subject; but what has been said should suffice to allow a few tentative conclusions:

(1) The similarity of the two systems under the aspect here discussed is striking. Their democratic and antidemocratic features are to a large extent the same. Both systems show a strong sense for fair play, especially in criminal procedure, for the importance of the legal form, or, in other words, for due process and equality before the law, but both are formalistic and plutocratic.

(2) The really decisive institutions for the protection of the individual and the democratic way of life are not due to the "spirit of the law" but to political action. This view is confirmed by the third observation which I want to make:

(3) In spite of its liberal law Roman history ended in a form of absolutism unsurpassed in oppressiveness until recent times. The Anglo-Saxon countries may not have been so far from Facism as many are inclined to think, but after the political bankruptcy of all fascist states the continuance of the democratic system seems to be assured for the future that lies within our view. Since the two legal systems discussed in this paper were so similar in their characteristics, and yet applied by nations living under so opposite political systems, is it not probable that the spirit of the law plays only a minor role in the development of the nations? Political actions and historical circumstances seem to be the decisive factors which determine the ways of life of the people. In comparison with these, the spirit of the law seems of less importance. When the great political decisions are made, law becomes only the instrument through which the spirit of the nation speaks.

ROBERT NEUNER

WASHINGTON, D. C.

[32] Pfaff, *Über den Schutz des wirtschaftlich Schwächeren in der römischen Kaisergesetzgebung* (1897). Brassloff, *op. cit.* n. 7 *supra.*

Notes and Reviews

A MESSAGE BY PROFESSOR SALVATORE RICCOBONO

To Professor Ernst Levy
Magister of the Riccobono Seminar of Roman Law in America
for the academic year 1944-1945.*

Honorable Magister, dear friend and colleague,

I was indeed most happy to receive your letter of last July 16th, which arrived here on the 30th of September. It was with great pleasure that I learned of your appointment as Magister of the Roman Law institute in America, a pleasure deepened by the memory of our old friendship, which has become ever stronger in the communion of study and has been nourished by our agreement on the basic problems that have been the object of our mutual research.

It gave me besides a deep and particular satisfaction to learn that the institute in America has not interrupted its activity in this tragic period of world history, and I most earnestly desire that the most important of its discussions be published, as in the past, in the *Bullettino dell' Istituto* in Rome, in order to strengthen even more the already solid bonds of co-operation existing between the jurists of Europe and America. And it is also my great hope that such collaboration will be intensified in the immediate future, when, as is now certain, the triumph of the principles of liberty and justice will inaugurate a new era in the history of nations.

In fact, I consider that such mutual co-operation has now become a necessity. The work of postwar reconstruction will require the

* This letter arrived in January 1945. The Editors wish to express their gratitude to Professor Levy who kindly granted the permission to publish the inspiring document in SEMINAR, and to Miss Alba I. Zizzamia who translated it from the Italian original.

participation of all men of thought; and among the grave problems demanding solution, juridical questions will certainly occupy an important place to guarantee the order and discipline of the new world that is to be born of the present conflict. Hence new and important duties will fall also upon the Romanists, and the institute which you direct at present will surely find itself in first place among them.

Even today—in fact, especially today—we may profit by the experience of the past, richly instructive above all in the field of law, which is the most immediate manifestation of the life of a people.

The Roman world presents periods of crisis not unlike those in which we live. The most serious was that resulting from the Punic Wars, namely, from the most arduous and formidable conflict Rome ever endured for her very existence and expansion. But the consequences were good. After the Punic Wars, the ancient cultures became fused in a harmonious and superior unity set within a vast system of peoples and guided by a lofty ideal of justice and order. Side by side with Roman national law, there could gradually develop that universal law which, realizing the principle of human equality, began and has since then promoted, at least in the field of private law, the leveling of all races. And that was no small achievement for those times. The creation of this universal law was the immortal accomplishment of Rome; it was corroborated in Justinian's codification and from there spread throughout the civilized world. And the miraculous force of its expansion was due to the fact that it was entirely permeated with simple human truths, culled from the experience of daily life, so that Cicero, following the philosophical teachings of the Greeks, could say it was based on *naturalis ratio.*

This recollection of one of the most grandiose events in human history should not only be a source of inspiration with regard to the duties binding upon us in the present hour, but it should also fortify our hope of a better world to come. Even today, after the tragic conflict now drawing to a close, at least in Europe, we may not only hope for, but foresee the creation of a vaster communion of peoples, guided by nobler ideas of liberty and justice.

In this new community of nations living together in peace, new needs will arise in the organization of social and international relationships, and hence new institutions, structures and legal forms, which will have to be worked out with enlightened wisdom. In this constructive labor, the Roman sources can be used as the most precious heritage of legal experience and technique. It is of profit to recall here the statement, made more than once, that in over a thousand years there have been no new juridical doctrines formulated the germ of which, at least, was not already to be found in the Roman sources; while on the other hand questions and problems which the great jurisprudence of Rome did not succeed in solving have always remained unsolved.

To those who know this field, my statement about the efficacy of the contribution which we may legitimately expect of students of Roman law, toward building the foundations of a new history and a new law, will not seem casual or inconsiderate. In this regard may I repeat what I said here in my last address in 1939, *Sul compenso delle spese,* namely, that it is the essential duty of us jurists, to draw from the study of the ancient sources the maximum profit for present-day law. This obligation can be fulfilled only by concentrating our interest on the study of that law which is still alive: the law of Justinian's codification. It is well known that the field of research in Roman law today is a broad one, including both the historico-scientific and the more particularly juridico-practical aspect. In the nineteenth century, as in the sixteenth, by far the greatest emphasis was on historical research, and Roman law scholars lost touch with the practical jurists of the preceding centuries.

Today it seems necessary to re-establish the ancient tradition which never divorced jurisprudence from the problems and interests of daily life. The fear that this would tend to undermine the importance and value of strictly historical studies in the field of law does not seem justified. On the contrary, since they are indispensable for knowledge of the ancient world in general in all its aspects, there will always be increasingly larger groups of scholars devoted to them among historians, archeologists, philologists, sociologists, papyrologists, epigraphists, and so on. But it is unquestionably

evident that the matter of most immediate and urgent interest for jurists is to illustrate the law which spread and asserted itself in the modern world and which forms the basis of present day codes, that is, the law worked out by the jurists of Rome and handed down to us in the codification of Justinian.

With this orientation, the field of the Romanist embraces the whole process of development of modern law, down through the Gloss, and Canon law and the laws which have contributed to the formation of the [continental] " common " law.

This program, which I have just sketched so summarily, has been substantially the program of the institute of Roman law in America, as is evident from the noteworthy lectures made known in Europe through the *Bullettino* of Rome. They have repeatedly treated the most vital, and still essential, problems of modern Roman law study: the value of the individual will, the efficacy of custom, the influence of Stoic and, later, Christian ethics on the Roman system, the relationship between Stoicism and Christianity, the limits and nature of the supposed Roman individualism. Some of these problems, like the first two (will and custom), reappear in the doctrines of modern law systems, and I should like to express an observation in this regard: It is true, on the one hand, that we ought to make the greatest possible use of the Roman sources for the progress of modern law, but, on the other, we must beware of the danger of judging Roman doctrines merely on the basis of modern necessities. Beginning with R. Jhering, the principle of the individual will, for example, has been strenuously opposed; it has been declared contrary to the ends of law and Byzantine in character, and the same has been said of custom. Such a condemnation is unjust. If now individual will and custom have lost much of their original force, it is due to the fact that in most modern states the legislative form of law prevails, so that the experience of Rome, together with that of the succeeding centuries, is now definitely fixed in rules of law which often exclude any concrete investigation. But the conditions under which those doctrines developed in the Roman world were quite different, in fact quite the opposite; for the law was then being formed and consolidated almost directly from the

daily experience of business and legal decisions. Hence to try to deduce, as some have done, the value and function of will and custom in the Roman world from their present importance is an anti-historical procedure as well as a real error in methodology.

It is to be hoped, however, that the interest in Roman legal studies will not diminish as a result of the crisis through which our world is now passing. In fact, I believe that the study of Roman law has a great future in America, and I base my belief on evident indications—first among them, the increasing enthusiasm which Americans are now showing for this field.

And this conviction is also my earnest wish for the science to which I have dedicated my whole life. But it is a much broader wish that I should like to have the fortune and the honor to communicate to you on the inauguration of the work of the institute for the year 1944-45, a wish that joins the aspirations of all the nations suffering through the overwhelming devastations of the war. From the fall of tyranny, from all the bloodshed and agony and destruction, may it please God that a truly better world may be born, in which the peoples of the earth, finally free and brothers, may live in peace and social justice and dedicate all their energies to a strengthening of the spiritual bonds between them, with the common goal of promoting human culture and progress.

And with this wish, I send my most fraternal greeting to the Magister, begging him warmly to convey it to the members of the Institute and particularly to my dear colleagues of America.

Salvatore Riccobono

Rome

A NOTE ON P. ARGENT. GR. I VERSO COL. I

F. Heichelheim, republishing in *Journal* of *Egyptian Archeology* XXIX (1944) p. 78f. *P. Argent. Gr.* I verso col. I, finds in this text additional proof for his assertion that the Attic *drachma* and the *denarius* in many Egyptian documents of the early fourth century mean the new silver coin of three scruples, and that the *noummion* is as a rule a gold coin. My arguments against the assertion of Heichelheim are to be found in *Byzantion* XV (1940-41), 250ff. nn. 7 and 11. *P. Argent. Gr.* I verso, col. I reads:

(lin. 7 f.) *ματος μνᾶ [α. Ὀ]μο(ῖον?) νουμ]μί[ο]υ τὰ (τάλαντα κ]ε. [Τοῦ-]του (γίνονται) μναῖ ρ[.]η.*

(lin. 19 f.) *μισθοῦ ἐκτινάξε<ιν> τὰ σί[π]πια ὡς τοῦ μὲν δηναρίου ἑνὸς (ταλ.)α.*

Line 20 deals apparently with a *denarius* of the old coinage exceptionally still used in the beginning of the fourth century, as was the old Egyptian drachma.[1] The equation of such a *denarius* to a talent would place *P. Argent. Gr.* I at the end of the reign of Constantine.[2] Heichelheim's reading of line 7 has not the slightest foundation as the text clearly shows. No *noummia* are known in the beginning of the fourth century, and gold *noummia* never existed. Moreover the Roman *aureus* of the end of the reign of Diocletian was at no time equal to 25 pieces of silver of 3 scruples.[3] Attic *drachmae* and *denarii* in the early fourth century were as a rule the small *denarii* of the Edict of Diocletian. We hope that Heichelheim will soon republish also col. II and col. III of *P. Argent. Gr.* I verso.

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[1] A. Segrè, *Byzantion*, XV (1940-41), 259.

[2] *Ibid.*, p. 263.

[3] *Ibid.*, p. 254.

BIBLIOGRAPHY OF ANGLO-AMERICAN STUDIES IN ROMAN, GREEK, AND GRECO-EGYPTIAN LAW AND RELATED SCIENCES (1939-1945)

The cessation of the war in Europe offers the opportunity to those of us who have been able to carry on our studies in relative tranquillity to extend our felicitations to colleagues across the sea, who again will be able to pursue their work under happier conditions. As a gesture of welcome, the authors offer this bibliography of works in Roman, Greek and Greco-Egyptian law and institutions that have appeared in the Anglo-American world during the period of strife. True, many of these items appear in journals that may not be found on the European continent, but the titles alone should assure our friends abroad that the study of those fields of ancient legal history has continued, even flourished, during the war.

Even the American and English scholars in the field may not have realized the number of studies, in widely scattered periodicals, that have been devoted to this sphere of ancient law. No attempt has been made to evaluate the items, for even the most modest paper may contain the germ of an idea that another scholar can carry to fruition. A complete survey of law reviews and classical journals was made, as well as a selection of those archaeological, historical, economic and theological periodicals which might contain articles in the field. The period covered is January 1939 to April 1945. The authors hope that the list is complete as far as studies of a direct legal nature are concerned, and that in the selection of items in the related social sciences (topic H) and book reviews noted, none of particular interest to the legal scholar has been omitted. In any event, a continuation of this bibliography in the future might supply the lacunae.

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List of Abbreviations

Am. Hist. Rev. = American Historical Review.
Am. J. Arch. = American Journal of Archaeology.
Am. J. Philol. = American Journal of Philology.
Am. L. School Rev. = American Law School Review.
Angl. Theol. Rev. = Anglican Theological Review.
Ann. Inst. Philol. Hist. Orient. = Annuaire de l'Institut de Philologie Orientales et Slaves. Vol. VII (1939-1944), published in New York.
Boston U. L. Rev. = Boston University Law Review.
Brooklyn L. Rev. = Brooklyn Law Review.
Bull. Polish Inst. = Bulletin of the Polish Institute of Arts and Sciences in America (New York).
Byz. = Byzantion, Vols. XV and XVI, published in Boston.
Camb. L. J. = Cambridge Law Journal.
Cath. Hist. Rev. = Catholic Historical Review.
Cl. J. = Classical Journal.
Cl. Philol. = Classical Philology.
Cl. Q. = Classical Quarterly.
Cl. Rev. = Classical Review.
Cl. Weekly = Classical Weekly.
Econ. Hist. Rev. = Economic History Review.
Engl. Hist. Rev. = English Historical Review.
Geo. L. J. = Georgetown Law Journal.
Harv. L. Rev. = Harvard Law Review.
Harv. St. Cl. Philol. = Harvard Studies in Classical Philology.
Harv. Theol. Rev. = Harvard Theological Review.
Hesp. = Hesperia.
Ill. L. Rev. = Illinois Law Review.
J. Bibl. Lit. = Journal of Biblical Literature.
J. Eg. Arch. = Journal of Egyptian Archaeology.
J. Hell. St. = Journal of Hellenic Studies.
J. Rel. = Journal of Religion.
J. Rom. St. = Journal of Roman Studies.
Jew. Q. Rev. = Jewish Quarterly Review.
Jurid. Rev. = Juridical Review.
Jurist = The Jurist.
La. L. Rev. = Louisiana Law Review.
Law. Guild Rev. = Lawyers' Guild Review.
Law J. = Law Journal.
Law Q. Rev. = Law Quarterly Review.
Mediev. Hum. = Medievalia et Humanistica.
Neb. L. Rev. = Nebraska Law Review.
Notre Dame Law. = Notre Dame Lawyer.
Oreg. L. Rev. = Oregon Law Review.

Pol. Sc. Q. = Political Science Quarterly.
Res Jud. = Res Judicatae (Melbourne).
Seminar = Seminar. An Annual Extraordinary Number of The Jurist.
So. Afr. L. J. = South African Law Journal.
Traditio = Traditio. Studies in Ancient and Medieval History, Thought and Religion.
Trans. Amer. Philol. Assoc. = Transactions and Proceedings of the American Philological Association.
Tul. L. Rev. = Tulane Law Review.
U. Toronto L. J. = University of Toronto Law Journal.
Va. L. Rev. = Virginia Law Review.
Wis. L. Rev. = Wisconsin Law Review.
Yale Cl. St. = Yale Classical Studies.
Yale L. J. = Yale Law Journal.

Summary: I. Rome.—II. Greece.—III. Greco-Roman Egypt.—IV. Addenda.—A. General legal treatises.—B. Sources, legal science, and philosophy of law.—C. Private law.—D. Criminal law.—E. Procedure.—F. Public law and Institutions (Constitutional and administrative law, finances, army, international relations).—G. Provincial administration.—H. Selected titles in history, economics, social and religious problems.—I. The influence of Roman law upon other legal systems.—J. Miscellany.

I. Rome

A. *General Legal Treatises*

1. Buckland, W. W., *A manual of Roman private law* (2nd ed., Cambridge 1939) pp. xxix, 434.

2. Jolowicz, H. F., *Historical introduction to the study of Roman law* (rev. ed., Cambridge 1939) pp. xxxi, 542.

3. Lee, R. W., *The elements of Roman law, with a translation of the Institutes of Justinian* (London 1944).
Reviewed by: A. A. Schiller, *Harv. L. Rev.* LVIII (1945) 626-628.

4. Seagle, W., *The quest for law* (New York 1941) pp. 92-98, 134-40, 157-165, and passim.

B. *Sources, Legal Science, and Philosophy of Law*

5. Allen, C. K., *Law in the making* (3rd ed. Oxford 1939). (Theory of custom, precedent, equity in Roman law).

6. Bell, H. I., "P. Giss. 40 and the Constitutio Antoniniana. Reply to A. Segrè," *J. Eg. Arch.* XXVII (1942) 39-49.

7. Berger, A., "Pourquoi Jus Graeco-Romanum? Autour d'une terminologie," *Ann. Inst. Philol. Hist. Orient.* VII (1944) 357-368.

8. Breen, Q., "Justinian's Corpus Juris Civilis," *Oreg. L. Rev.* XXIII (1944) 219-248.

9. Buckland, W. W., "Interpolations in the Digest. A criticism of criticism," *Harv. L. Rev.* LIV (1941) 1273-1310.

10. Buckland, W. W., "The Interpretationes to Pauli Sententiae and the Codex Theodosianus," *Law Q. Rev.* LX (1944) 361-365.

11. Buckland, W. W., "Pauli Sententiae and the compilers of the Digest," *Law Q. Rev.* LXI (1945) 34-38.

12. Buckland, W. W., "Praetor and chancellor," *Tul. L. Rev.* XIII (1939) 163-167.

13. Cormack, J. M. R., "Letter of Hadrian in Beroea," *J. Rom. St.* XXX (1940) 148-152.

14. Crawford, D. C., "Laudatio funebris," *Cl. J.* XXXVII (1941) 17-27.

15. Donnelly, F. P., *Cicero's Manilian Law* (New York, Fordham University Press, 1939) pp. 93.

16. Geer, R. M., "Notes on the land-law of Tiberius Gracchus," *Trans. Amer. Philol. Assoc.* LXX (1939) 30-36.

17. Gertrude Emilie, Sister, "Cicero and the Roman pietas," *Cl. J.* XXXIX (1944) 536-542.

18. Graser, R., "The significance of two new fragments of the Edict of Diocletian," *Trans. Amer. Philol. Assoc.* LXXI (1940) 157-174.

19. Heichelheim, F. M., "The text of the constitutio Antoniniana and the three other decrees of the Emperor Caracalla contained in Pap. Gissensis 40," *J. Eg. Arch.* XXVI (1940) 10-22.

20. Honig, R. M., "The Nicene faith and the legislation of the early Byzantine emperors," *Angl. Theol. Rev.* XXXV (1943) 304-323.

21. Levy, E., "Vulgarisation of Roman law in the early Middle Ages," *Mediev. Hum.* I (1943) 14-40.

22. Malz, G., "The date of Justinian's Edict XIII," *Byz.* XVI (1942-1943, published 1944) 135-141.

23. Oliver, J. H., "Notes on documents of the Roman East. On the great inscription of Octavian found at Rhosos," *Am. J. Arch.* XLV (1941) 537-540.

24. Pharr, C., "The text and interpretation of the Theodosian Code VI, 4, 21," *Am. J. Philol.* LXVI (1945) 50-58.

25. Pharr, C., "Roman legal education," *Cl. J.* XXXIV (1939) 257-270.

26. Pringsheim, F., "The character of Justinian's legislation," *Law Q. Rev.* LVI (1940) 229-246.

27. Pringsheim, F., "The unique character of classical Roman law," *J. Rom. St.* XXXIV (1944) 60-64.

28. Quasten, J., "A Roman law of Egyptian origin in the Passio SS. Perpetuae et Felicitatis," *Jurist* I (1941) 193-198.

29. Schiller, A. A., "Roman interpreation and Anglo-American interpretation and construction," *Va. L. Rev.* XXVII (1941) 733-768.

30. Schulz, F. "Collection of Roman legal maxims on papyrus," *J. Rom. St.* XXXI (1941) 63-69.

31. Taubenschlag, R., "The legislation of Justinian in the light of the papyri," *Byz.* XV (1940-1941) 280-295.

32. Vasiliev, A., "Edict of the Emperor Justinian II, September 688," *Speculum* XVIII (1943) 1-13.

See also nos. 33, 270.

C. *Private Law*

33. Bruck, E. F., "Ethics vs. Law; St. Paul, the Fathers of the Church and the cheerful giver in Roman law," *Traditio* II (1944) 97-121.

34. Buckland, W. W., "Alienation and manumission by one of consortes (Gaius 3, 154a)," *Law Q. Rev.* LVIII (1942) 483-486.

35. Buckland, W. W., "Cause of action: English and Roman," *Seminar* I (1943) 3-10.

36. Buckland, W. W., "Contrectatio," *Law Q. Rev.* LVII (1941) 467-474.

37. Buckland, W. W., "Cumulation in the actio doli," *Law Q. Rev.* LV (1939) 222-229.

38. Buckland, W. W., "Gaius I 166. Tutela parentis manumissoris," *J. Rom. St.* XXXIII (1943) 11-14.

39. Buckland, W. W., "The nature of contractual obligation," *Camb. L. J.* VIII (1944) 247-251.

40. Buckland, W. W., "Principal and fideiussor. Consumptio litis," *Jurid. Rev.* LIII (1941) 281-297.

41. Bush, G. M., "Mancipatio. Propria mancipatio rerum mancipi. A dogmatic study," *Jurid. Rev.* LII (1940) 38-74.

42. Cooper, D. A., "Impossible conditions in Roman and modern law; a summary review," *Tul. L. Rev.* XVI (1942) 433-444.

43. Daube, D., "Interference with light in Roman law," *Law J.* XCIII (1943) 180-181, 189-190.

44. Daube, D., "Nocere and noxa," *Camb. L. J.* VII (1939) 23-55.

45. Daube, D., "Tres personae possunt dotis dictione obligari," *Jurid. Rev.* LI (1939) 11-22.

46. Duff, P. W., *Personality in Roman Law* (1938).

Reviewed by D. Daube, *J. Rom. St.* XXXIII (1943) 86-93, XXXIV (1944) 125-135.

47. Field, James A., Jr., "The purpose of the Lex Julia and Papia Poppaea," *Cl. J.* XL (1945) 398-416.

48. Gardiner, A. H., and De Zulueta, F., "Adoption extraordinary," *J. Eg. Arch.* XXVI (1941) 23-29.

49. Johnston, W. R., "Emphyteusis; a Roman 'perpetual' tenure," *U. Toronto L. J.* III (1940) 323-347.

50. Jolowicz, H. F., *Digest XLVII. 2: De Furtis.* (Cambridge 1940) pp. xci, 137.

51. Levy, E., "Captivus redemptus," *Cl. Philol.* XXXVIII (1943) 159-176.

52. Levy, E., "Principal and surety in classical Roman law," *Seminar* II (1944) 6-22.

53. Lévy-Bruhl, H., "The act per aes et libram," *Law Q. Rev.* LX (1944) 51-62.

54. Pringsheim, F., "Legal estate and equitable interest in Roman law," *Law Q. Rev.* LIX (1943) 244-249.

55. Rabel, E., "Real securities in Roman law. Reflections on a recent study by the late Dean Wigmore," *Seminar* I (1943) 32-47.

56. Segrè, A., "The stipulatio. Its original meaning," *Ann. Inst. Philol. Hist. Orient.* VII (1944) 273-282.

57. Thayer, J. B., "Actio praescriptis verbis. Roman bona fide contracts," *Tul. L. Rev.* XIX (1944) 62-78.

58. Thayer, J. B., "Correality in Roman law," *Seminar* I (1943) 11-19.

59. Thayer, J. B., "Poison in Roman private law," *Boston U. L. Rev.* XXIII (1943) 290-291.

60. Westrup, C. W., *Introduction to early Roman law. Comparative sociological studies. The patriarchal joint family. III: Patria potestas. The nascent law.* (Copenhagen-London 1939) pp. 310.

    Reviewed by: F. Schulz, *J. Rom. St.* XXXII (1942) 131-134.

61. Wigmore, J. H., "Pledge-mortgage idea in Roman law; a revolutionary interpretation," *Ill. L. Rev.* XXXVI (1941) 371-393.

62. Wolff, H. J., *Written and unwritten marriages in Hellenistic and post-classical Roman law.* (Philological monographs published by the American Philological Association, IX, Haverford 1939) pp. 128.

63. Zulueta, F. De, *The Roman law of sale. Introduction and select texts.* (Oxford 1945) pp. 265.

See also no. 271.

D. *Criminal Law*

64. Berger, A., "Some remarks on cattle-stealing in Roman law," *Seminar* II (1944) 23-40.

65. Braginton, M. V., "Exile under the Roman Emperors," *Cl. J.* XXXIX (1944) 39-407.

66. Montgomery, H. C., "The development of humanitarianism in Roman law," *Classical Studies in honor of W. A. Oldfather* (University of Illinois Press, Urbana 1943) 104-121.

See alo nos.: 36, 44, 50.

E. *Procedure*

67. Dorsey, R. T. C., "Manifestations of Roman procedure," *Am. L. School Rev.* IX (1942) 1482-1495.

68. Wenger, L., *Institutes of the Roman law of civil procedure.* With an Introduction by R. Pound. (Revised edition. Translated by O. H. Fisk, New York, 1940) pp. xxix, 440.

Reviewed by: R. Neuner, *Yale L. J.* L (1940) 192-193.
H. E. Yntema, *Brooklyn L. Rev.* X (1941) 312-316.
H. J. Wolff, *La. L. Rev.* V (1943) 367-372.

See also nos.: 36, 44, 50.

F. *Public Law and Institutions*

(Constitutional and Administrative Law, Finances, Army, International Relations)

69. Beaumont, R. L., "The date of the first treaty between Rome and Carthage," *J. Rom. St.* XXIX (1939) 74-86.

70. Bromberg, B., "Temple banking in Rome," *Econ. Hist. Rev.* X (1940) 128-131.

71. Charanis, P., "Coronation and its constitutional significance in the later Roman Empire," *Byz.* XV (1940-1941) 49-66.

72. Cram, R. V., "The Roman censors," *Harv. St. Cl. Philol.* LI (1940) 71-110.

73. Davidson, T. S., *A Study in Roman administrative law* (Diss. Vanderbilt University 1944).

74. Fink, R. O., "Mommsen's Pridianum: BGU. 696," *Am. J. Philol.* LXIII (1942) 61-72.

75. Gilbert, R. L., "Origin and history of the peregrine praetorship, 242-166 B.C.," *Res Jud.* II (1939) 50-58.

76. Gillian, J. F., "The ordinarii and ordinati of the Roman army," *Trans. Amer. Philol. Assoc.* LXXI (1940) 127-148.

77. Hammond, M. "Septimius Severus, Roman bureaucrat," *Harv. St. Cl. Philol.* LI (1940) 137-173.

78. Higgins, M. J., "International relations at the close of the sixth century," *Cath. Hist. Rev.* XXVII (1941) 279-315.

79. Hill, H., "Aes equestre, aes hordiarium, and triplex stipendium," *Cl. Philol.* XXXVIII (1943) 132-134.

80. Hill, H., "Census equester," *Am. J. Philol.* LX (1939) 357-362.

81. Howe, L. L., *The Pretorian Prefect from Commodus to Diocletian, A.D. 180-305.* (University of Chicago Press 1943) pp. 141.
Reviewed by: H. Last, *J. Rom. St.* XXXIV (1941) 121-125.

82. Jones, A. H. M., "In eo solo dominium populi Romani est vel Caesaris," *J. Rom. St.* XXXI (1941) 26-41.

83. Last, H., "The fiscus: a note," *J. Rom. St.* XXXIV (1944) 51-59.

84. Lind, L. R., "Roman military exemption," *Classical Studies in honor of William Abbott Oldfather* (University of Illinois Press, Urbana 1943) 94-103.

85. Loader, W. R., "Pompey's command under the lex Gabinia," *Cl. Rev.* LIV (1940) 134-136.

86. McDonald, A. H., "Rome and the Italian Confederation (200-186 B.C.)," *J. Rom. St.* XXXIV (1944) 11-33.

87. McIlwain, C. H., *Constitutionalism, ancient and modern* (Cornell University Press, Ithaca 1940) Chap. III: Rome.

88. Marsh, F. B., *Modern problems in the ancient world* (University of Texas, 1943) pp. 123.

89. Moore, R. W., *The Roman Commonwealth* (English Universities Press, London 1942) pp. 267.

90. O'Brien-Moore, A., "M. Tullius Cratippus, priest of Rome, CIL III 399" (with an Excursus "Recipients of Roman citizenship and their names"), *Yale Cl. St.* VIII (1942) 25-49.

91. Paterson, M. L., "Rome's choice of magistrates during the Hannibalic war," *Trans. Amer. Philol. Assoc.* LXXIII (1942) 319-390.

92. Robinson, L., *Freedom of speech in the Roman Republic* (Diss. Baltimore 1940) pp. 93.
Reviewed by: A. Momigliano, *J. Rom. St.* XXXII (1942) 120-124.

93. Rowell, H., "The honesta missio from the numeri of the Roman imperial army," *Yale Cl. St.* VI (1939) 71-108.

94. Schulz, F., "Roman registers of birth and birth certificates," *J. Rom. St.* XXXII (1942) 78-91; XXXIII (1943) 55-64.

95. Scott, J. B., *Law, the State and the international community.* 2 vols. (New York 1939). Chaps. VII-IX: The Roman heritage, Chap. XVII: Survival and influence of Roman law and jurisprudence.

96. Segrè, A., "Essays on Byzantine economic history. I: The annona civica and the annona militaris," *Byz.* XVI (1942-43 published 1944) 392-444.

97. Segrè, A., "Inflation and its implication in early Byzantine times," *Byz.* XV (1940-41) 249-279.

98. Segrè, A., "A note on the classes of Roman officials in the age of Diocletian," *Trans. Amer. Philol. Assoc.* LXXIV (1943) 102-108.

99. Sherman, C. P., "Modernness of Roman military law," *Boston U. L. Rev.* XXIV (1944) 31-44.

100. Sherwin-White, A. N., "Procurator Augusti," *Papers of the British School at Rome* XV, N.S. II (1939) 11-27.

101. Sherwin-White, A. N., *The Roman citizenship* (Oxford 1939) pp. 315.

102. Starr, C. G., *Roman imperial navy* (Cornell Studies in Classical Philology, XXVI, Ithaca 1941) pp. xv, 228.

103. Sutherland, C. H. V., "Aerarium and fiscus during the early Empire," *Am. J. Philol.* LXVI (1945) 151-170.

104. Taylor, L. R., "Cicero's aedilship," *Am. J. Philol.* LX (1939) 194-201.

105. Walbank, F. W., "Polybius on the Roman constitution," *Cl. Q.* (1943) 73-89.

106. West, L. C., "Notes on Diocletian's Edict of prices," *Cl. Philol.* XXXIV (1939) 39-45.

107. West, L. C., "The Roman gold standard and the ancient sources," *Am. J. Philol.* LXII (1941) 289-301.

108. Westbury-Jones, J., *Roman and Christian imperialism* (London 1939) pp. xxxvii, 374.

See also nos.: 6, 23, 51, 127, 129, 132, 140, 145.

G. *Provincial Administration (except Egypt)*

109. Balsdon, J. P. V. D., "Consular provinces under the late Republic," *J. Rom. St.* XXIX (1939) 57-73; 167-183.

110. Broneer, O., "An official rescript from Corinth," *Hesp.* VIII (1939) 181-190.

111. Chilver, G. E. F., *Cisalpine Gaul: social and economic history from 49 B.C. to the death of Trajan* (Oxford 1941) pp. 235.

112. Glanville, D., *A study of the Comites Orientis and the Comites Syriae* (Diss. Princeton 1939) pp. 22.

113. Hough, J. N., "Few inefficiencies in Roman provincial administration," *Cl. J.* XXXV (1939) 17-26.

114. Larsen, J. A. O., "Tituli Asiae Minoris II, 508," *Cl. Philol.* XXXVIII (1943) 177-190 (to be continued).

115. Lucas, C., "Notes on the curatores rei publicae of Roman Africa," *J. Rom. St.* XXX (1940) 56-74.

116. Mitchell, Sir William, *Social basis of Roman power in Asia Minor.* Prepared by J. G. C. Anderson (University Press Aberdeen 1941) pp. 305.

117. Richmond, I. A., and Stevens C. E., "The land register of Arausio," *J. Rom. St.* XXXII (1942) 65-77.

118. Stevenson, G. H., *Roman provincial administration till the age of the Antonines* (London 1940) pp. 182.
Reviewed by: J. M. Cobban, *J. Rom. St.* XXX (1940) 103-105.

See also nos.: 23, 89, 135, 203, 213.

H. *Selected Titles in History, Economics, Social and Religious Problems*

119. Adcock, F. E., "Women in Roman life and letters," *Greece and Rome,* XIV (1945) 1-11.

120. Boak, Arthur E. R., *A history of Rome to A.D. 565* (3rd ed., New York 1943) pp. xii, 552.

121. *The Cambridge Ancient History,* Vol. XII. *The Imperial crisis and recovery, A.D. 193-324* (Cambridge 1939) pp. xxvii, 849.

122. Carcopino, J., *Daily life in ancient Rome. The people and the city at the height of the Empire* (Yale University Press 1940) pp. xv, 342.

123. Cary M. and Haarhoff, T. J., *Life and thought in the Greek and Roman world* (London 1940) pp. 352.

124. Charanis, P., *Church and State in the later Roman Empire. The religious policy of Anastasius the First, 491-518* (University of Wisconsin Studies in the Social Sciences and History, XXVI, 1939) pp. 102.
Reviewed by: E. Honigman and H(enri) G(régoire), *Byz.* XVI (1944) 559-565.

125. Frank, Tenney, *An economic survey of ancient Rome,* Vol. V. *Rome and Italy of the Empire* (Baltimore 1940) pp. 445.
General Index to Vols. I-V (Baltimore 1940) pp. 140.
Vol. IV reviewed by: C. B. Welles, *Am. J. Arch.* XLIV (1940) 165-167.
A. H. M. Jones, *J. Rom. St.* XXIX (1939) 121-123.
Vol. V reviewed by: H. Last, *J. Rom. St.* XXX (1940) 200-203.

126. Geer, R. M., *Classical civilization: Rome* (New York 1940) pp. xxiii, 414.

127. Ginsburg, M., "Roman military clubs and their social functions," *Trans. Am. Philol. Assoc.* LXXI (1940) 149-156.

128. Goldstein, N. M., "Cultivated pagans and ancient anti-Semitism," *J. Rel.* XIX (1939) 346-364.

129. Haskell, H. J., *The new deal in old Rome. How Government in the ancient world tried to deal with modern problems* (New York 1939) pp xii, 258.

Reviewed by: E. Tavenner, *Cl. J.* XXXV (1940) 542-545.

130. Kennedy, E. C., and White, G. W., *S.P.Q.R. History and social life of ancient Rome* (New York 1942) pp. xii, 278.

131. Limebeer, D. E., *The Greeks and the Romans,* 2 vols. (Cambridge 1940) pp. 144, 158.

132. Loane, H. J., "Vespasian's spice market and tribute in kind," *Cl. Philol.* XXXIX (1944) 10-21.

133. Lopez, R. S., "Silk-industry in the Byzantine Empire," *Speculum* XX (1945) 1-42.

134. McGeachy, J. A., *Quintus Aurelius Symmachus and the senatorial aristocracy of the West* (University of Chicago Libraries, private edition, 1942) pp. 203.

135. Mohler, S. L., "Slave education in the Roman Empire," *Trans. Am. Philol. Assoc.* LXXI (1940) 262-280.

136. Parker, H. M. D., *A history of the Roman world from A.D. 138-337* (Macmillan's History of the Greek and Roman world, VII, New York 1939) pp. 402.

137. Rand, E. K., *Building of eternal Rome* (Lowell Institute Lectures, Harvard University Press 1942) pp. 318.

Reviewed by: M. B. Ogle, *Am. J. Philol.* LXVI (1945) 211-213.

138. Raymer, A. J., "Slavery—the Graeco-Roman defence," *Greece and Rome* X (1940) 17-21.

139. Rayner, A. J., "Christian society in the Roman Empire," *Greece and Rome,* XI (1942) 113-123.

140. Reinhardt, C. W., *Outlines of Roman history, constitutional, economic, social* (London 1939) pp. 277.

141. Slamon, E. T., *History of the Roman world from 30 B.C.-138 A.D.* (Macmillan's History of the Greek and Roman world, VI, New York 1944) pp. 376.

142. Scramuzza, V. M., *The Emperor Claudius* (Harvard Historical Studies, XLIV, Cambridge, Mass. 1940) pp. 328.

Reviewed by: A. Momigliano, *J. Rom. St.* XXXII (1942) 125-127.

143. Smith, C. E., *Tiberius and the Roman Empire* (La. State University Press, Baton Rouge 1942) pp. 281.

144. Starr, J., *The Jews in the Byzantine Empire, 641-1204* (Athens 1939) pp. 266.

145. Syme, R., *The Roman revolution* (Oxford 1939) pp. 568.

146. Taylor, L. R., "The election of the pontifex maximus in the late Republic," *Cl. Philol.* XXXVII (1942) 421-424.

147. Trever, A. A., *History of ancient civilization,* Vol. II. *The Roman world* (New York 1939) pp. xvii, 817.

148. Westermann, W. L., "Between slavery and freedom," *Am. Hist Rev.* L (1945) 213-227.

See also nos.: 14, 18, 20, 25, 77, 96, 106, 107, 108, 111, 116, 117.

I. *The Influence of Roman Law Upon Other Legal Systems*

149. Campbell, J., "Romanization of Scottish law," *Boston U. L. Rev.* XXII (1942) 581-589.

150. Colvin, H. M., "Participation of the United States of America with the Republics of Latin America in the common heritage of Roman and civil law" (*Proceedings, Eighth American Scientific Congress held in Washington, May 10-18, 1940,* X, 1943) 467-491.

151. Gilmore, M. P., *Argument from Roman law in political thought, 1200-1600* (Harvard Historical Monographs, XV, Cambridge 1941) pp. 148.

152. Kantorowicz, H., *Bractonian Problems.* With a short memoir of the Author by D. M. Stenton (Glasgow 1941) pp. 133.

Reviewed by: F. Schulz, *Law Q. Rev.* LIX (1943) 172-180.

G. E. Woodbine, *Yale L. J.* LII (1943) 428-444.

C. H. McIlwain, *Harv. L. Rev.* LVII (1943) 220-237.

153. Kirchberger, H., "Significance of Roman law for the Americas and its importance to inter-American relations," *Wis. L. Rev.* 1944, 249-273.

154. Kisch, G., "Juridical lexicography and the reception of Roman law," *Seminar* II (1944) 51-81.

155. Lee, R. W., "Interaction of Roman and Anglo-Saxon Law," *So. Afr. L. J.* LXI (1944) 155-173.

156. Levy, E., "Reflections on the first 'Reception' of Roman law in Germanic States," *Am. Hist. Rev.* XLVIII (1942) 20-29.

157. Lopez, R. S., "Byzantine law in the seventh century and its reception by the Germans and the Arabs," *Byz.* XVI (1942-1943, published 1944) 445-461.

158. McIlwain, C. H., "Our heritage from the law of Rome," *Foreign Affairs* XIX (1941) 597-608.

159. Plucknett, T. F. T., "Relations between Roman law and English common law down to the sixteenth century; a general survey," *U. Toronto L. J.* III (1939) 24-50.

160. Post, G., "Roman law and early representation in Spain and Italy," *Speculum* XVIII (1943) 211-232. See also: "Plena potestas and consent in medieval assemblies," *Traditio* I (1943) 355-408.

161. Richardson, H. G., "Azo, Drogheda, and Bracton," *Eng. Hist. Rev.* LIX (1944) 22-47.

162. Richardson, H. G., "Tancred, Raymond, and Bracton," *Eng. Hist. Rev.* LIX (1944) 376-384.

163. Sherman, C. P., *Roman civilization in the modern world* (New Haven, Conn. 1942) pp. 204.

164. Vance, J. T., *The background of Hispanic-American law* (New York 1943) pp. viii, 296.

See also nos.: 95, 271, 272, 273.

J. *Miscellany*

165. Breen, Q., "Study of the history of Roman law in the law-school curriculum," *Oreg. L. Rev.* XXIII (1944) 182-195.

166. Cohen, B., "The relationship of Jewish and Roman law," *Jew. Q. Rev., N. S.* XXXIV (1944) 267-280; 409-424.

167. Ginsburg, M., "Nordic blood in Roman law," *Neb. L. Rev.* XX (1941) 239-250.

168. Jolowicz, H. F., "Professor W. W. Buckland," *Law Q. Rev.* LV (1939) 321-323.

169. Lieberman, S., "Roman legal institutions in early Rabbinics and in the Acta Martyrum," *Jew. Q. Rev.*, N. S. XXXV (1944) 1-57.

170. Mechling, W. H., "Study of Roman law in England" (Letter, with a Reply from Q. Breen), *Oreg. L. Rev.* XXIV (1944) 54-59.

171. Rabel, E., "On comparative research in legal history and modern law," *Bull. Polish Inst.* II (1944) 868-881.

172. Rheinstein, M., and Wolff, H. J., "Ernest Rabel, septuagenarian," *Tul. L. Rev.* XIX (1944) 1-3.

173. Wylie, J. K., "The present crisis of Roman law and its bearing on the legal situation in South Africa," *So. Afr. L. J.* LVI (1939) 190-217.

II. Greece

B. *Sources, Legal Science and Philosophy of Law*

174. Atkinson, K. M. T., "Athenian legislative procedure and revision of laws," *Bulletin of the John Rylands Library* XXIII (1939) 107-150.

175. Cairns, H., "Plato's theory of law," *Harv. L. Rev.* LVI (1942) 359-387.

176. Calhoun, G. M., *Introduction to Greek legal science*. Edited by F. De Zulueta (Oxford 1944) pp. 86.

Reviewed by: V. Ehrenberg, *J. Hell. St.* LXIII (1943) 116-117. J. Frank, *Harv. L. Rev.* LIII (1944) 1120-1134.

177. Chroust, A. H., and Osborn, D. L., "Aristotle's conception of justice," *Notre Dame Law.* XVII (1942) 129-143.

178. Dow, S., and Travis, A. H., "Demetrios of Phaleron and his law giving," *Hesp.* XII (1943) 144-165.

179. Meritt, B. D., "Notes on Attic decrees I.G. I^2 1," *Hesp.* X (1941) 301-337.

180. Morrow, G. R., "On the tribal courts in Plato's Laws," *Am. J. Philol.* LXII (1941) 314-321.

181. Munro, J. A. R., "The ancestral laws of Cleisthenes," *Cl. Q.* XXXIII (1939) 84-97.

182. Schlaifer, R., "A fragment of a proxeny decree from Ios," *Hesp.* XIII (1944) 22.

See also no. 5 (Equity in Greek law).

C. *Private Law*

183. Morrow, G. R., *Plato's law of slavery in the relation to Greek law* (Illinois Studies in Language and Literature, XXXV 3, Urbana 1939) pp. 140.

184. Oliver, J. H., "On the Ephesian debtor law of 85 B.C.," *Am. J. Philol.* LX (1939) 468-470.

185. Robinson, D. M., "Greek horoi and a new Attic mortgage inscription," *Hesp.* XIII (1944) 16-21.

186. Westermann, W. L., "Athenaeus and the slaves of Athens," *Harv. St. Cl. Philol.* Suppl. vol. I (1940) 451-470.

187. Westermann, W. L., "Slave maintenance and slave revolts," *Cl. Philol.* XL (1945) 1-15.

188. Westermann, W. L., "Slavery and the elements of freedom in ancient Greece," *Bull. Polish Inst.* I (1943) 332-347.

189. Wolff, H. J., "Marriage law and family organization in ancient Athens," *Traditio* II (1944) 43-95.

190. Wolff, H. J., "The δίκη βλάβης in Demosthenes' Or. LV," *Am. J. Philol.* LXIV (1943) 316-324.

See also no. 181.

D. *Criminal Law*

191. Bonner, R. J., "The use of hemlock for capital punishment," *Harv. St. Cl. Philol.* Suppl. vol. I (1940) 299-302.

192. Colchester, L. S., "Justice and death in Sophocles," *Cl. Q.* XXXVI (1942) 21-28.

E. *Procedure*

193. Bonner, R. J. and Smith, G., "Administration of justice in Boeotia," *Cl. Philol.* XL (1945) 11-23.

194. Bonner, R. J., and Smith, G., "Administration of justice in the Delphic Amphictyony," *Cl. Philol.* XXXVIII (1943) 1-12.

195. Bonner, R. J., and Smith G., "Administration of justice in Sparta," *Cl. Philol.* XXXVII (1942) 113-129.

196. Dow, S., "Aristotle, the kleroteria, and the courts," *Harv. St. Cl. Philol.* L (1939) 1-34.

197. Forster, E. S., "Guilty or not guilty? Four Athenian trials," *Greece and Rome* XII (1943) 21-26.

See also no. 180.

F. *Public Law and Institutions*

(Constitutional and Administrative Law, Finances, Army, International Relations)

198. Balogh, E., *Political refugees in Ancient Greece from the period of the tyrants to Alexander the Great.* With the collaboration of F. M. Heichelheim (Johannesburg, Witwatersrand University Press, 1943), pp. xvi, 134.

Reviewed by: P. Treves, *J. Hell. St.* LXII (1943) 132-133.
H. J. Wolff, *Am. J. Philol.* LXVI (1945) 203-206.

199. Ferguson, W. S., "Polis and Idia in Periclean Athens. The relation between public service and private activities," *Am. Hist. Rev.* XLV (1940) 269-278.

200. Fritz, K. von, "Conservative reaction and one-man-rule in Ancient Greece," *Pol. Sci. Q.* LVI (1941) 51-83.

201. Hill, B. H., and Meritt, B. D., "An early Athenian decree concerning tribute," *Hesp.* XIII (1941) 1-15.

202. Hopper, R. J., "Interstate juridical agreements in the Athenian Empire," *J. Hell. St.* LXIII (1943) 35-51.

203. Jones, A. H. M., *The Greek city from Alexander to Justinian* (Oxford 1940), pp. 393.

204. Larsen, J. A. O., "The constitution and original purpose of the Delian League," *Harv. St. Cl. Philol.* LI (1940) 175-214.

205. Larsen, J. A. O., "Federation for peace in ancient Greece," *Cl. Philol.* XXXIX (1944) 145-162.

206. Lewis, N., "Solon's agrarian legislation," *Am. J. Philol.* LXII (1941) 144-156.

207. Mayor, H. B., "Strategy at Athens in the fifth century," *J. Hell. St.* LIX (1939) 45-64.

208. Notopulos, J. H., "Methods of choosing archons in Athens under the Empire," *Am. J. Philol.* LXV (1944) 149-166.

209. Oliver, J. H., *The sacred gerousia* (The American Excavations in the Athenian Agora, *Hesp.*, Suppl. vol. VI. American School of Classical Studies at Athens, 1941), pp. xi, 204.

210. Pritchett, W. K., "The term of office of Attic strategoi," *Am. J. Philol.* LXI (1940) 467-474.

211. Schlaifer, R., "The Attic association of the Μεσογεῖοι," *Cl. Philol.* XXXIX (1944) 22-27.

See also nos.: 87 (Chap. II: Greece), 98 (Chaps. II-VI: The Greek Background), 193, 194, 195.

H. *Selected Titles in History, Economics, Social and Religious Problems*

212. Couch, H. N., *Classical civilization: Greece* (New York 1940) pp. xxix, 577.

213. Day, J., *Economic history of Athens under Roman domination.* (Columbia University Press, New York 1942) pp. 300.

214. Forbes, C. A., *Teacher's pay in ancient Greece.* (University of Nebraska Studies in Humanities, no. 2, 1942) pp. 60.

215. Lind, L. R., "Economic man in ancient Athens," *Cl. J.* XXXV (1939) 27-38.

216. Michell, H., *Economics of ancient Greece.* (New York 1940) pp. 415.

217. Milne, J. G., "Trade between Greece and Egypt before Alexander the Great," *J. Eg. Arch.* XXV (1939) 177-183.

218. Prentice, W. K., *Ancient Greeks. Studies toward a better understanding of the ancient world.* (Princeton Univ. Press 1940) pp. 254.

219. Rostovtzeff, M., *Social and economic history of the Hellenistic world.* 3 vols. (Oxford 1941) pp. 1749.

Reviewed by: N. Lewis, *Cl. Weekly* XXXVI (1943) 187-192.

W. W. Tarn, *J. Rom. St.* XXXI (1941) 165-171.

See also nos.: 88, 123, 131, 138, 148, 187, 188, 198, 199, 208.

J. *Miscellany*

220. Meritt, B. D., "Greek inscriptions," *Hesp.* XII (1944) 210-268.

221. Tod, M. N., "The progress of Greek epigraphy," *J. Hell. St.* LXII (1942) 51-83.

III. Greco-Roman Egypt

A. *General Legal Treatises*

222. Glanville, S. R. K., (editor), *Legacy of Egypt.* (Oxford 1942) pp. xx, 424. Ch. VIII: Law, by E. Seidl.

223. Taubenschlag, R., *The law of Greco-Roman Egypt in the light of the papyri,* 332 B. C.-640 A. D. (New York 1944) pp. 447.

Reviewed by: E. F. Bruck, *Harv. L. Rev.* LVIII (1944) 144-149.

Wolff, H. J., *Law. Guild Rev.* IV (1944) 47-48.

C. B. Welles, *Am. J. Arch.* XLVIII (1944) 399-400.

A. E. R. Boak, *Am. Hist. Rev.* L (1944) 106-107.

S. Kuttner, *Cath. Hist. Rev.* XXX (1944) 322-323.

A. Berger, *Historia Judaica,* VI (1944) 207-208.

J. Quasten, *Traditio* II (1944) 519-522.

224. Wolff, H. J., "Papyrology, its scope, history and achievements," *Bull. Polish Inst.* III (1945) 384-398.

B. *Sources, Editions of Papyri*

225. Adler, E. N., Tait J. G., and Heichelheim, F. M., *The Adler Papyri.* The Demotic texts, by Griffith, F. L. (Oxford University Press 1939) pp. 118, 16 plates.

Reviewed by: C. B. Welles, *Am. J. Arch.* XLIV (1940) 564-566.

226. Glanville, S. R. K., *British Museum. Department of Egyptian and Assyrian Antiquities. Catalogue of Demotic Papyri in the Museum. A Theban Archive of the reign of Ptolemaios Soter I* (London 1939) pp. lii, 73.

227. Hunt-Smyly-Edgar, *The Tebtunis papyri,* Vol. III, Part II (1938).
Reviewed by: H. C. Youtie, *Am. J. Philol.* LXIII (1942) 244-248.

228. Husselman, E. M., Boak, A. E. R., and Edgerton, W. F., *Michigan Papyri,* vol. V. *Papyri from Tebtunis, Part II.* (Ann Arbor, The University of Michigan Press 1944) pp. xx, 446, 6 plates.

Reviewed by: C. H. Roberts, *J. Eg. Arch.* XXIX (1943) 80.
J. Quasten, *Traditio* II (1944) 523-524.

229. Johnson, A. C., and Goodrich, S. P., *Papyri in the Princeton University Collection,* Vol. III (Princeton University Studies in Papyrology, vol. IV, 1942) pp. 124.

230. Lobel, E., Roberts, C. H., and Wegener, E. P., *The Oxyrhynchus Papyri* Part XVIII. (Egypt Exploration Society. Graeco-Roman Memoirs. Oxford 1941) pp. 228, 14 plates.

Reviewed by: O. M. Pearl, *Am. J. Arch.* XLVII, 1943, 497-500.
H. I. Bell, *J. Rom. St.* XXXIII, 1943, 115-117.

231. Oliver, J. H., and Evelyn-White, H. G., "Edict of Tiberius Julius Alexander" in: *The Metropolitan Museum of Art. The Temple of Hibis in El Khargeh Oasis.* Part II. *Greek Inscriptions* (Egyptian Expedition Publications XIV, New York 1939) 23-44. (*ibid.*: Edict of Gnaeus Vergilius Capito, 1-18, Edict of Lucius Julius Vestinus, 19-23).

232. Segrè, A., "On the date and circumstances of the Prefect's letter, P. Oxy. 2106," *J. Eg. Arch.* XXVI (1940) 114-115.

233. Segrè, A., "P. Yale Inv. 1528 and P. Fuad 21," *J. Rom. St.* XXX (1943) 153-155.

234. Turner, E. G., *Aberdeen Scotland University Library. Catalogue of Greek and Latin Papyri and Ostraca in the possession of the University.* (Aberdeen University Studies no. 116, Aberdeen 1940), pp. xix, 116, 5 plates.

235. Westermann, W. L., Keyes, C. W., and Liebesny, H., *Columbia University Library. Zenon Papyri. Business papers of the third century B. C. dealing with Palestine and Egypt,* Vol. II (Columbia University Press 1940) pp. 221, 7 plates.

Reviewed by: C. B. Welles, *Cl. Philol.* XXXVII (1942) 432-437.

236. Youtie, H. C., and Pearl, O. M., *Michigan Papyri,* Vol. IV, Part II. *Tax Rolls from Karanis. Text and Indexes* (Ann Arbor, The University of Michigan Press 1939) pp. 266, 3 plates.

237. Youtie, H. C., and Pearl, O. M., "O. Mich. I 154," *Am. J. Philol.* LXII (1941) 80-83.

238. Youtie, H. C., and Pearl, O. M., *Papyri and Ostraca from Karanis. Michigan Papyri,* Vol. VI (Ann Arbor, The University of Michigan Press 1944), pp. xxi, 252, 6 plates.

See also nos.: 6, 19, 30, 31, 258.

C. *Private Law*

239. Bell, H. I., "Registration of a chirograph of sale: P. Harr. 133," *J. Eg. Arch.* XXV (1939) 52-54.

240. Fink, R. O., "The sponsalia of a classiarius. A reinterpretation of P. Mich. Inv. 4703," *Trans. Am. Philol. Assoc.* LXXII (1942) pp. 109-124.

241. Parker, R. A., "A late demotic gardening agreement," *J. Eg. Arch.* XXVI (1940) 84-113.

242. Sanders, H. A., "Appointment of a guardian by the prefect of Egypt," *Am. J. Arch.* XLVI (1942) 94-98.

243. Segrè, A., *An essay on the nature of real property in the classical world.* (mimeographed, New York 1943) pp. 143.

244. Wolff, H. J., "An Oxyrhynchus receipt for repayment of loans," *Trans. Am. Philol. Assoc.* LXXI (1940) 616-622.

See also nos.: 62, 231.

D. *Criminal Law*

See no. 223.

E. *Procedure*

245. Wolff, H. J., "The praxis-provision in papyrus contracts," *Trans. Am. Philol. Assoc.* LXXII (1941) 418-438.

See also no. 68.

F. *Public Law and Institutions*

(Constitutional and Administrative Law, Finances, Army International Relations)

246. Bell, H. I., "Antinoopolis. A Hadrianic foundation in Egypt," *J. Rom. St.* XXX (1940) 133-147.

247. Boak, A. E. R., "Some early Byzantine tax records from Egypt," *Harv. St. Cl. Philol.* LI (1940) 36-60.

248. Lewis, N., "A sidelight on Diocletian's revival of agriculture," *J. Eg. Arch.* XXIX (1943) 71-73.

249. Rogers, R. S., "The prefects of Egypt under Tiberius," *Trans. Am. Philol. Assoc.* LXXII (1941) 365-371.

250. Segrè, A., "The Ptolemaic copper inflation ca. 230-140 B. C.," *Am. J. Philol.* LXII (1942) 174-192.

251. Wallace, S. LeRoy, "Receipts for φόρος προβάτων in the Papyrus Collection of the University of Wisconsin," *J. Eg. Arch.* XXV (1939) 62-66.

252. Wallace, S. LeRoy, *Taxation in Egypt from Augustus to Diocletian*, 1938. Reviewed by: H. C. Youtie, *Am. J. Philol.* LXII (1941) 94-101.

253. West, L. C., and Johnson, A. C., *Currency in Roman and Byzantine Egypt.* (Princeton 1944) pp. 195.

254. Westermann, W. L., "Tuscus, the Prefect and the veterans in Egypt, P. Yale Inv. 1528 and P. Fuad I 21," *Cl. Philol.* XXVI (1941) 21-29.

255. Wolfson, H. A., "Philo on Jewish citizenship in Alexandria," *J. Bibl. Lit.* LXIII (1944) 165-168.

See also nos.: 6, 19, 97, 231, 236.

H. *Selected Titles in History, Economics, Social and Religious Problems*

256. Bell, H. I., "Anti-Semitism in Alexandria," *J. Rom. St.* XXXI (1941) 1-18.

257. Bell, H. I., "Evidences of Christianity in Egypt during the Roman period," *Harvard Theol. Rev.* XXXVII (1944) 185-208.

258. Heichelheim, F. M., "Pap. Argent. Gr. 1 verso col. I: a tenant's agricultural account," *J. Eg. Arch.* XXIX (1943) 78-79.

259. Thompson, H., "Two demotic self-dedications," *J. Eg. Arch.* XXVI (1941) 68-78.

260. Welles, C. B., "The Greeks in Egypt," Abstract. *Am. J. Arch.* XLIII (1939) 308-309.

See also nos.: 97, 133, 248, 250, 253, 255.

J. *Miscellany*

261. Milne, J. G., Skeat, T. C., Turner, E. G., and others, "Bibliography: Graeco-Roman Egypt. Part I. Papyrology (1938)," *J. Eg. Arch.* XXV (1939) 70-89. (§§ 4. 5. 9).

262. Pearl, O. M., "Varia papyrologica," *Trans. Am. Philol. Assoc.* LXXI (1940) 372-390.

263. Pringsheim, F., "Bibliography: Graeco-Roman Egypt. Papyrology (1939). Law," *J. Eg. Arch.* XXVI (1941) 139-147.

264. Segrè, A., "Notes on some Greek papyri," *Byz.* XVI (1942-43, published 1944) 566-572.

265. Tod, M. N., "Bibliography: Graeco-Roman Egypt. Part II. Greek Inscriptions (1937-1938)," *J. Eg. Arch.* XXV (1939) 89-93.

266. Tod, M. N., "Bibliography: Graeco-Roman Egypt. Greek Inscriptions (1939-1940)," *J. Eg. Arch.* XXVII (1941) 153-160.

267. Youtie, H. C., "Notes on O. Mich. I," *Trans. Am. Philol. Assoc.* LXXI 1940) 623-659.

268. Youtie, H. C., and Pearl, O. M., "Notes on Papyri," *Am. J. Philol.* LXIII (1942) 294-307.

269. Youtie, H. C., "Parerga ostracologica," *Trans. Am. Philol. Assoc.* LXXIII (1942) 64-85.

IV. Addenda

ad I.B.

270. "Index titulorum Authentici," *Seminar* II (1944) 82-89.

ad I. C.

271. Parker, R., "History of the holograph testament in the civil law," *Jurist* III (1943) 1-31.

ad I. I.

272. Gsovski, V., "Roman law and the Polish jurists," *Seminar* I (1943) 74-98.

273. Schulz, F., "A new approach to Bracton," *Seminar* II (1944) 41-50.

Introduction to Greek Legal Science by George M. Calhoun, edited by Francis De Zulueta. Oxford: At the Clarendon Press, 1944 VIII + 86 pp. 5*s*. 6*d*.

The small volume under review is the last work of the distinguished historian of Greek law of the University of California, whose death on June 16, 1942, caused grief among all those interested in Greek legal history. It was originally intended to be a chapter in a co-operative history of legal science, a project which had to be abandoned after H. Kantorowicz, its chief designer, had died. The hope that Professor Calhoun would, thereupon, enlarge his article into a full-sized treatise had to remain unfulfilled, but Professor De Zulueta justly felt that even in its original form the contribution was worthy of separate publication. He and the Clarendon Press deserve our thanks for having made Calhoun's interesting essay available to the public.

The book depicts in five brief sketches the intellectual background of the Greek legal system under the primitive monarchy, the aristocracies, in the age of the lawgivers, under the Athenian democracy, and in the Hellenistic age; and a final section is devoted to some observations on Greek "legal literature." All this is written in the vivid and beautiful manner which was a characteristic of Calhoun's writings. The presentation is confined to broad outlines, but enriched by an appendix of translations of selected passages from the sources and by short bibliographies compiled by the editor on the basis of the author's own notes. In this form the book will certainly give pleasure and inspiration to non-specialist readers.[1] The specialist must not expect any startling revelations, but he too will enjoy having this first attempt to present comprehensively an aspect of Greek intellectual life which has not yet received the attention it deserves.[2]

[1] See for instance the interesting review by J. Frank, *Harvard Law Rev.* LVII (1944) 1120ff.

[2] Only once before was the subject taken up in a special treatise: by Rodolphe Dareste, *La science du droit en Grèce* (Paris, 1893). The book is merely a reproduction of the contents of pertinent portions from the writings of Plato, Aristotle, and Theophrastus. Short remarks are also found in Weiss, *Griechisches Privatrecht* I (Leipzig, 1923) 27f., and in Jaeger, *Demosthenes, The Origin and Growth of His Policy* (Berkeley, 1938) 27f. See, further,

As the title indicates, the book is not so much a *history of,* as an *introduction to* Greek legal science. As such, it gives both more and less than one might perhaps expect. It gives less, in so far as nothing is said about how Greek thinkers tackled specific problems of legal doctrine. This may in part be due, as the editor points out, to the restrictions of space imposed on the author, but it is also due, as will be shown, to his general approach. The book gives more, in that some sections, especially those dealing with the periods prior to the Athenian democracy, are mainly a cursory recapitulation of what is known about the political conditions, the organization of justice, and the basic concepts determining the legal institutions and evolutions of the times. These matters pertain to the general history of the law rather than to that of the knowledge of, and theoretical speculation about, the law, so that these chapters are in a certain contrast with those on the Athenian democracy and on "legal literature", which primarily deal with the latter problems. However, justification for the author's procedure may be found in the fact that in the primitive age there was no speculative thinking about legal questions; and it has to be admitted that the survey gives color to the discussion of the character of legal learning in the early period.

The presentation follows the general lines worked out by philological students of Greek law. In spite of its conciseness, the picture is sufficiently substantiated to give the reader a plastic view of the working of the Greek legal mind in the pre-classical period, as seen by this school of thought.[3]

Who did possess expert knowledge of the law in those times and in what did it consist? For the period of the "primitive monarchy", as represented by the Homeric poems, the author attributes it to the *dikaspoloi* whom he defiines as kings or elders preserving the rules of customary law (θέμιστες), as well as further developing them in the pronouncements (δίκαι) which they made in their capac-

Beauchet, *Histoire du droit privé de la République Athénienne* (Paris, 1897) I p. xvff., and Paoli, *Studi sul processo attico* (no. II of the *Studi di diritto processuale,* ed. Calamandrei; Padua, 1933) 4f.

[3] Exception should be taken to an anachronistic formulation on p. 12, where the primitive prevalence of the *oikos* over the individual is interpreted in terms of an acknowledgment of the household as a "legal person."

ity as arbitrators, voluntarily resorted to on account of their experience, wisdom, and natural authority as heads of their groups. He considers (p. 17) the possibility that the *dikaspoloi* might have developed into a professional body of jurisprudents and believes that such evolution was prevented by the monopolization of legal knowledge and its use as a political instrument for the advancement of their own interests by a hereditary ruling class. The aristocratic monopoly was first broken by the early codifications of the customary law and finally overcome when, in the democratic era, written laws and dispensation of justice by popular courts made familiarity with the law a common good of the average citizen.

Unfortunately this reconstruction of the historical process, attractive though it may appear in its simplicity and consistency, does not in all its parts seem to stand up against a critical analysis of the evidence. More specifically, Calhoun's theory regarding the rôle of the Homeric *dikaspoloi* is questionable. The *dikaspoloi* were not simply the wise old men, the Nestors and Mentors, to whom the people turned in search of a just and peaceful solution of their controversies. In one of the two passages where alone in the epic the term occurs, young Telemach is the *dikaspolos* (*Od.* 11. 186). The title does not indicate any particular wisdom or ability which he may have displayed, but simply refers to one of the functions involved in Odysseus' *γέρας* which had devolved on Telemach in his father's absence. This fits in perfectly with the other testimony, *Il.* 1.238, where the sceptre is declared to be a symbol of the dignity of the *δικασπόλοι οἵτε θέμιστας πρὸς Διὸς εἰρύαται*. *Δικασπόλος* is not an honorific appellation accorded to men well versed in the customary law and regularly engaged in dispensing justice, but a technical expression denoting an official function.[4] It is not acci-

[4] T. E. Shaw (Lawrence of Arabia), *The Odyssey of Homer* (New York, 1940) 208, correctly translates *Od.* 11. 184-186: "Your *fair position* has not fallen to another. Telemach holds the estate unchallenged, feasting among his peers at all such entertainments as *magistrates* may properly attend" (italics mine). The *δικασπολέν* is also listed as one of the *τρία ἔργα* of the king—the two others being *τὸ στραταγέν* and *τὸ θεραπευὲν θεώς*—by the Pythagorean Diotogenes, *Περὶ Βασιλείας* (Stob. *Floril.* 4. 7. 61 [Wachsmuth-Hense]). Diotogenes' further statement: *δικασπολὲν δὲ καὶ διακούειν πάντων τῶν ὑπ' αὐτῶν φύσιν δικαίω καὶ νόμω καλῶς ἐκμαθών*, would suit Calhoun's interpretation, but can only be taken as philosophical speculation. Nor can any conclusions be drawn

dental that in Homer's description of a trial scene on the shield of Achilles (*Il.* 18.490-508) the γέροντες are not called δικασπόλοι.

To understand the implication of the term it is necessary to realize the purpose and nature of judicial litigation in the primitive age.[5] There is little doubt that arbitration and other voluntary methods of reaching a peaceful decision of controversies did play an important part, and it is likewise only natural that kings and elders were predestined to act as arbitrators. But, despite the fact that such seems to be the commonly accepted opinion, it is unlikely that compulsory adjudication of claims by public magistrates or popular courts developed gradually from voluntary arbitration. Far into the historical period, when ordinary judicial procedure had long become a matter of course, the aim of litigation was not adjudication of a substantial claim but a decision on the right to proceed with an act of selfhelp initiated before the case went to court. Judicial litigation was enforced indirectly, inasmuch as a king or magistrate charged with the task of maintaining domestic peace compelled the aggressor to desist from his forcible action until it had been declared admissible.[6]

The conclusion that δικασπόλος was a term to denote this peace official seems reasonably safe. It is, furthermore, likely that the expression did not, as the author believes (pp. 9, 10), refer to the handing down of decisions, which might be involved in the functions of the *dikaspolos*. There is reason to assume that in a free community—where the βασιλεύς was not, as in Hesiodic society, a lord

from the fact that in the affected language of the Byzantine epoch δικασπόλος was occasionally used for *iudex:* Agathius Scholast. in *Anthol. Palat.* XI no. 376 (cf. also Hesych. *s. v.*). In post-Homeric Greek the word was almost completely relegated to the poetic language; its occurrences (listed by Liddell-Scott) are of no value for the determination of its meaning in the epical period.

[5] A detailed exposition of the theory outlined above will be found in the reviewer's forthcoming article: "The Origin of Judicial Litigation among the Greeks," scheduled for publication in *Traditio,* vol. IV (1946).

[6] As for early Rome, where very similar conditions prevailed, see Koschaker's analysis, *ZRG, Rom. Abt.* XXXVII (1916) 356, from whose point of view the reviewer differs only in so far as Koschaker shares Wlassak's opinion that public control exerted by the magistrate was gradually and reluctantly superimposed on an original custom of seeking a decision by way of voluntary and purely private arbitration.

of the manor patriarchally ruling over humble peasants and craftsmen, but like Telemach, a *primus inter pares*—the police functions (i. e., preventing unwarranted selfhelp and allowing warranted selfhelp) and the judicial function (i. e., the decision on the right to use selfhelp) were separated in a manner analogous to that of Rome.[7] As a matter of fact, despite Hirzel and those who follow him, it is almost certain that the implication of the word δίκη in its original conception was not that of *judgment*. Lack of space forbids us to enter upon a detailed inquiry into the history of this term. Whatever changes and vacillations it may have undergone, the use made of δίκη in the classical legal terminology, particularly such combinations as δίκην λαμβάνειν or διδόναι, would have been impossible had its earliest technical implication been that of *decision*.[8] According to the author, p. 63, it originally meant merely *way*. To the archaic mind it must have had a subjective color, the implication of right, of receiving or taking one's due or—perhaps only in a somewhat more advanced age—of acting in a way justified by the concepts which determined the ethical and legal life of society.[9]

[7] This can be inferred from the scene on the shield, where the γέροντες seem to appear in a rôle very much like that of the Germanic *Urteilsfinder*, as well as from Gortynian and Athenian phenomena.

[8] The derivation of δίκη from δείκνυμι is rejected by Ehrenberg (*Die Rechtsidee im frühen Griechentum* [Leipzig, 1921] 70) who points out the incompatibility of this etymology with the short iota in δίκη. No opinion can be ventured here on Ehrenberg's own etymology which, in agreement with Hirzel's, connects δίκη with δικεῖν. Whatever merits its may possess, Ehrenberg's conclusions, which also rest on the idea that *judgment* was the meaning of δίκη, cannot be accepted.

[9] Such is the meaning in most of the Homeric occurrences of the term, particularly in the undoubtedly old (see Ehrenberg, *op. cit.* 54) passage, *Il.* 19.180 (differently Ehrenberg); see, further, *Il.* 23.542; *Od.* 4.691; 9.215; 11.218; 11.570; 14.59; 14.84; 24.255. In all these passages a subjective conception of δίκη (*right* or *privilege*) seems to suit the intention of the poet better than the objective meaning of *custom* or *usage*, which is generally assumed for some of them (see Liddell-Scott). In the post-Homeric literature, Hes. *Erga* 272: εἰ μείζω γε δίκην ἀδικώτερος ἔξει, is of particular value in that it shows side by side the probably older conception of right based on the mere fact that it can be enforced (here through unjust judgments; cf. *Erga* 192: δίκη δ'ἐν χερσί) and a probably younger conception in which δίκη has assumed a moral tinge. We observe the transition from the original naive idea of δίκη to the ethical concept which makes its first appearance in Hesiod.—Cf. Weiss, *op. cit.* 23.

In its specifically legal application it came close to the Roman *actio*. Accordingly, to *state the right,* not to *give judgment,* was the original connotation of δικάζειν;[10] from here, it is true, δίκη might occasionally assume the broader meaning of *pronouncement.*[11]

Thus the *dikaspolos* appears to be a man who by virtue of his official position exerts public authority to interfere with δίκαι, self-help actions, of members of the community, for the purpose of subjecting them to a control as to their justification, whether this control be exercised by himself or by others. The expression has nothing to do with his ability or knowledge. We are not entitled to infer that an early trend toward the emergence of a class of impartial judges learned in the law was cut short by an unfavorable political development.

As regards the classical period, Calhoun points out how in democratic states, particuluarly at Athens, the existing conditions of a comparatively simple statutory law and of the participation of the whole citizenry in the dispensation of justice made possible a fairly complete knowledge by the average citizen of the legal system. He justly stresses the fact that members of the dicasteries were not jurors in the sense in which this term is used in the Common Law, but judges deciding on questions of both fact and law. He describes the rôle of the orators in classical Athens and discusses the more specialist training involved in their profession, but makes clear its limitations and the fact that the classical democracy did not see the emergence of a class of professional lawyers. This he attributes (pp. 44f., 47f.), perhaps somewhat too exclusively, to the characteristic distrust in which the expert was held by democratic Athenian society. Under the changed political conditions in the Hellenistic period the wide dissemination of a certain amount of legal learning again gave way to its concentration in a more limited group of persons connected with the government; and the Hellenistic monarchies, with administrative and judicial powers vested in appointed royal officials, were, in this respect linked with the aristocratic tradition rather than with democratic Athens. "The contribution of Athens", says the author on p. 56, "is to be looked

[10] Justification of this statement must be reserved for *Traditio* IV.

[11] See *Il.* 16.542 or Hesiod's ἰθεῖαι or σκολιαὶ δίκαι (for instance: *Erga* 36, 219).

for mainly on the theoretical side, in the work of the philosophers and in their influence upon the jurists of Rome."

There is doubtless a great deal of truth in this account of the actual situation. Nevertheless the impression left after a persual of the whole book does not seem to agree entirely with historical reality. A different distribution of accents and certain distinctions which the author either fails to make or does not make with sufficient decisiveness will show that he overrates the importance of legal learning and the influence exerted by a more scientific approach to matters legal on the evolution of the Greek legal system.

The amount and distribution of legal knowledge among the people have nothing to do with the questions of whether there was a true science of the law. The average Athenian in the fourth century B. C., no matter how well he might be versed in the statutes of the city and in the forms of administrative and judicial procedure, or how much practical experience he might have acquired through active participation in public life, was no more of a learned jurist than the Roman who knew the Twelve Tables by heart, or than a modern businessman who by long experience has become familiar with the legal aspects of his enterprise. It is true that there were specialists whose learning exceeded that of the average citizen; some of the orators and speech-writers no doubt attained a degree, not only of knowledge but also of ability to intepret and apply the laws and to offer a truly juristic argument, which classifies them as genuine legal experts in the Roman or modern sense. Still, the fact remains that neither at Athens nor, as far as we can see, elsewhere within the Greek sphere did the art of interpreting and applying the laws ever emerge a specialized discipline.

Calhoun does not overlook the fact that classical Athens did not know a class of professional lawyers or a systematic teaching of the law. But, although he justly emphasizes the seriousness of such legal arguments as do occur in forensic oratory (p. 36), he goes too far in considering them as testimonies of a real effort to reach a deeper understanding of the legal system in order to put its application on a more scientific basis. Theoretical discussion of legal questions in the schools of rhetoric and in philosophical circles was limited, in scope and choice of topics, by the general interests of these groups in teaching the art of forensic argumentation or in formulating certain conclusions and postulates resulting from their

speculation on ethical problems. Such literary documents as Antiphon's *Tetralogies*, the fifth book of Aristotle's *Nicomachean Ethics*, or chapters XIII-XV of the first book of his *Rhetoric* represent no more than this merely incidental interest in matters legal. Collections of speeches made on the occasion of trials must be regarded in the same light. Calhoun considerably overstates the facts when (p. 62) he sees a close parallel between such collections and modern case-books. Even those which, like the Isaean corpus, dealt mainly with one particular kind of judicial controversies, were obviously not intended to show in practical examples the effect of existing statutes on a given type of legal problems, but merely to provide the student of rhetoric with a set of model arguments, among which the one based on legal considerations was not the most important.

Fragment XV of Aristophanes' *Daitaleis*,[12] which shows how students learned the meaning of unfamiliar words occurring in old laws, obviously does not tell the whole story, at least not for the fourth century. But the superficial character of the legal instruction which the future orator received is, almost a century later, illustrated by a passage in the first pseudo-Demosthenic speech against Aristogito (*or.* XXV). In sect. 69 the speaker points out: By showing that the *συνθῆκαι* still are in the hands of the keeper and the *ὅροι* still stand on the premises, one proves the existence of a debt, while their removal or destruction is evidence for the contrary. Then he proceeds in sect. 70: *εἰσί τοίνυν ὧν Ἀριστογείτων ὀφείλει τῇ πόλει συνθῆκαι μὲν οἱ νόμοι, καθ' οὓς ἐγγράφονται πάντες οἱ ὀφλισκάνοντες, ὅρος δ'ἡ σανὶς ἡ παρὰ τῇ θεῷ κειμένη*. The significance of this flimsy analogy, which reveals a complete lack of understanding of fundamental legal concepts, is only enhanced by the mediocrity of the speaker. It sheds light on the degree of legal learning attained by the average student of rhetoric—the more so, since the speaker is trying hard to impress the audience with his education and theoretical knowledge. As a matter of fact, the attainment of a scientific approach to the law was not the object of this education.[13] Apart from providing the stu-

[12] Meineke, *Fragmenta poetarum comoediae antiquae* II, 2 (Berlin, 1840) 1031. See also Meineke's comment, p. 1033.

[13] Wilcox, *Amer. Journ. of Philol.* LXVI (1945) 171ff. (see also his article in *Harvard Stud. in Class. Philol.* LIII [1942] 121ff.) denies— probably too strongly—any considerable part of the art of forensic speaking in Attic rhetorical instruction.

dent with the necessary equipment for his pleading before judges who may have known their statutes but never bothered to analyze their judicial contents, the study of the laws was part of the moral preparation of the young Athenian for good citizenship, as is clearly stated by Plato, *Protag.* 326 c-e.[14]

A full realization of this situation looms large in determining the answer to one of the basic questions in Greek legal history, i. e., to what degree were legal concepts, actually applied in daily life and in the courts, shaped or influenced by theoretical discussions of legal problems and by doctrinal progress in rhetorical and philosophical circles? The overemphasis which the author puts on the mere knowledge of the laws and his failure to distinguish sufficiently mere knowledge from attempts at a scientific analysis have prevented him from approaching his subject from this angle. His statement on p. 56, just quoted (p. 100f. *supra*), refers to the part played by Athens in the universal history of law, but is not intended to draw a sharp line between practice and theoretical speculation, as far as Athens herself is concerned. Witness his remark on the ability of Athenian dicasts to grasp the meaning of complicated legal arguments (p. 36), or his suggestion (p. 55) that in the Hellenistic period "the complexity of the law, the varied and difficult legal questions to which it must have given rise" may have favored, along with other reasons, the development of "a professional class of legal advisers or advocates." Such passages make it obvious that he believes in a rather strong scientific influence on actual legal life both in classical and Hellenistic times.

It is impossible to enter here upon a detailed study of this problem. Suffice it to say that to all appearances the growth of Greek law, throughout its history, was little, or not at all, influenced by doctrine, at least as far as the practical application of the law and the evolution of legal concepts is concerned. Greek thinkers, it is true, did occasionally touch on questions relating to law and achieved lasting results in the field of jurisprudence, but their discussions were too abstract to make a deep impression on the everyday practice of orators or courts.[15] In general it seems that

[14] Jaeger, *op. cit.*, 213, note 16, may somewhat overrate the "formal rigor" of these studies.

[15] Perhaps the greatest theoretical achievement of the Greeks in the field of general jurisprudence was their analysis of the subjective element involved

Greeks never felt tempted to deal with specifically legal problems on the basis of existing systems and with the aim of establishing a theory which would give pleaders and courts a secure foundation for their arguments and decisions.[16] Even Theophrastus' great treatise was a mere comparative description of statutes and institutions, but not an analytical commentary in the manner of Roman legal writers—if we are allowed to draw conclusions from the nature of the brief fragment preserved by Stobaeus.[17]

Accordingly, the positive law of the Greek states always remained comparatively primitive as regards its intellectual foundation. There never evolved a theory of contracts or of wills,[18] the archaic

in human actions and their conclusions drawn therefrom with reference to the penal law; the history and results of these efforts have been laid down in Maschke's masterly *Willenslehre im griechischen Recht* (Berlin, 1926). But all the more important is the fact, justly emphasized by Kunkel in his review of Maschke's book (*ZRG, Rom. Abt.* XLVIII [1928] 710), that the deep insight into these problems attained by Plato and Aristotle, although based on observations made in the actual law of Athens, was never given practical effect by the courts of any Greek state. The same is true with respect to other results of Greek legal philosophy, such as Aristotle's fine analysis of the δίκαιον διορθωτικόν (*Eth. Nic.* 5. 4). Vinogradoff, to whom we owe a valuable discussion of Aristotle's conception ("Aristotle on Legal Redress," *Columbia Law Rev.* VIII [1908] 548ff., reprinted in *Collected Papers* II, 1ff.; see also *Outlines of Historical Jurisprudence* [Oxford, 1922] II, 45ff.), has overrated its practical influence. As regards the problem of an equitable justice, Greek popular thinking such as it found expression in the courts remained rather arbitrary and emotional, and Aristotle's endeavor to establish a doctrine of ἐπιείκεια as a corrective to the *ius strictum* (*Eth. Nic.* 5.10.3-7, *Rhet.* 1.13.13-14) was not successful; Radin, *Mnemosyna Pappulia* (Athens, 1934) 220. If it is true that some sort of equitable justice developed in the jurisdiction of Ptolemaic administrative officials (Wolff, *Transact. Amer. Philol. Ass.* LXXII [1941] 432, note 46), this was hardly due to the influence of Aristotelian ideas.

[16] The reviewer finds no evidence for Radin's assumption, *op. cit.* 213, that "systematic Greek treatises on jurisprudence . . . certainly existed." The character of legal writings can be inferred from the Sophistic tract περὶ νόμων, which the speaker against Aristogito is supposed to have used (Pohlenz, *Nachr. Gött. Ges. d. Wiss.* 1924, pp. 19ff. [not seen; cited after Jaeger, *op. cit.* 213 note 16]). It deals only in general terms with the usefulness of the laws as preservers of decency and order (see Demosth. XXV, 17, 20-27).

[17] Cf. Beauchet, *op. cit.*, p. xviii.

[18] See Maschke, *op. cit.*, 185.

separation of duty and liability was never quite overcome, and so forth.[19] As to the Hellenistic period, we can agree with Calhoun's assumption that the practice of law became a profession of trained experts; in fact the record of Hermias' lawsuit against the *choachytai* (*P. Tor.* 1; Mitteis, *Chrestom.* 31) offers evidence for this. No source, however, informs us about how these experts were trained. There is nothing to indicate that they were more than mere technicians.[20]

However, the backwardness of the Greek law as regards the theory did not prevent it from reaching a high degree of technical perfection which enabled it to serve the needs of the intricate business system of classical and Hellenistic times. This, of course, cannot have been the result of an entirely uncontrolled growth. More especially, in the Hellenistic period we find a great number of carefully executed standard forms for contracts and other legal acts, with the same fixed formulas in various, geographically widely separated areas, and which in some cases can be traced back into the classical era. They testify to the existence of a kind of cautelary jurisprudence.[21] We suggest that this type of expert treatment of legal questions was of greater importance for the development of the positive law than all the theoretical discussions held by

[19] The simplicity of the Attic law is significant, not so much, as the author suggests (p. 35), in that it enabled the common man to become familiar with legal institutions, as for the underlying fact that the contents of the law were never isolated in scientific analysis.

[20] Cf. Weiss, *op. cit.* 28.—It is true that the aggregation in colonial areas of settlers coming from various parts of the Hellenic world and their mingling with native populations created problems of jurisdiction and conflicts of laws. These were met by legislation and courts (as to Egypt, about which alone we possess information, see Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri* [New York, 1944] 6ff., 14ff.). But there is no evidence that would justify the author's belief (p. 54) that this situation constituted "a lawyer's paradise, a *medium optimum* for the growth of a learned judiciary and a learned profession of the law." If "learned" is taken, as it should be, in the Roman or modern sense, if it is to indicate anything like a scientific approach to the problems involved, then Calhoun's statement is indeed open to serious question.

[21] Cf. Weiss, *op. cit.* 28.

rhetoricians and philosophers. Unfortunately the author does not even mention this aspect of Greek legal science.

It is not impossible that legislation reflected the influence of theoretical considerations to a somewhat larger extent than did the application of the laws in daily legal practice. Calhoun (p. 52) mentions " the confluence of the practical with the theoretical legal tradition " in the case of Demetrius of Phaleron, the pupil of Theophrastus. From the times of Hesiod on, poets and thinkers pondered over the problem of the purpose of law in state and society. But it should not be forgotten that their speculations were of an ethical and political, not of a legal nature.[22] The author (pp. 27f.) justly stresses the fact that Solon's importance lay in the field of social and political reform, much more than in that of legal reform. It is to be regretted that Calhoun, like his precursor, Dareste, fails to make the same clear distinction in his discussion of the " philosophic legal writings " in the chapter on " legal literature ".

It was the reviewer's duty to point out what to his mind constitutes the weakness of the author's approach.[23] He does not, however, wish to leave his readers with the impression that he regards Calhoun's book as lacking very definite scholarly merits. While it does not seem to provide a fully satisfactory answer as to what Greek legal theory consisted in, and what part it played in the evolution of the positive law and in the general history of Greek thought, Calhoun's study does assemble, for all its brevity, a great number of important facts and interesting interpretations, many of which—some being advanced for the first time—may be expected to meet with general approval. Its chief value lies in the effort, as a whole successful, to determine the degree of legal knowledge among the various classes of the population in each historical epoch. It is a first step toward the solution of problems which must be

[22] This is well expressed by Gernet, *Arch. d'Hist. du Droit Orient.* I (1937) 144: "Il est remarquable qu'il n'y ait guère eu en Grèce, à proprement parler, une philosophie du droit, mais plutôt, et si constamment, une philosophie de la justice." See also Radin, *op. cit.* 213, with reference to Plato and Aristotle, and, more generally, Paoli, *op. cit.* 4, and Jaeger, *op. cit.* 28.

[23] After completion of his manuscript, the reviewer became acquainted with V. Ehrenberg's review, *Journ. Hellen. Stud.* LXIII (1943, publ. in 1945) 126f. Some of Ehrenberg's criticisms are based on considerations very similar to those proposed here.

effectively tackled before the general history of the Greek law can be written. The book calls the attention of students to a complex of phenomena still waiting for thorough exploration and thus forms a worthy conclusion to a distinguished scholarly career.

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Monthly Conferences:

October 4, 1944: Ernst Levy, "Late Roman and Early Visigothic Features in the Law of Property."

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December 15, 1944: Richard A. Kahn, Division of Fisheries, U. S. Department of the Interior, "The Roman Law of Fisheries."

January 18, 1945: Hans Julius Wolff, J.U.D., Legal Research Building, University of Michigan, Ann Arbor, "The Background of the Postclassical Legislation on Illegitimacy" (read, in the absence of the author, by Rev. Dr. Thomas O. Martin).

February 19, 1945: Charles P. Sherman, D.C.L., LL.D., Professor of Law, Boston University, "A Comparison of the Roman and Quebec Law of

Persons, Property, Obligations, and Successions" (read, in the absence of the author, by Dr. Brendan F. Brown).

March 16, 1945: Roscoe J. Dorsey, LL.M., D.C.L., Professor of Law, Washington College of Law, "The Development of, and Restrictions on, Roman Testamentary Power."

April 9, 1945: Robert Neuner, J.U.D., Federal Communications Commission, "The Democratic Spirit of the Roman Law and the Common Law."

May 3, 1945: Gordon Ireland, J.S.D., Visiting Professor of Law, The Catholic University of America, "Roman and Comparative Law in the Americas after the War."—Major Joseph Dainow, B.C.L., S.J.D., Professor of Law (on leave), Louisiana State University, "Significance of Comparative Law."

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